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EQUITY OF THE KING'S COURT BEFORE ...

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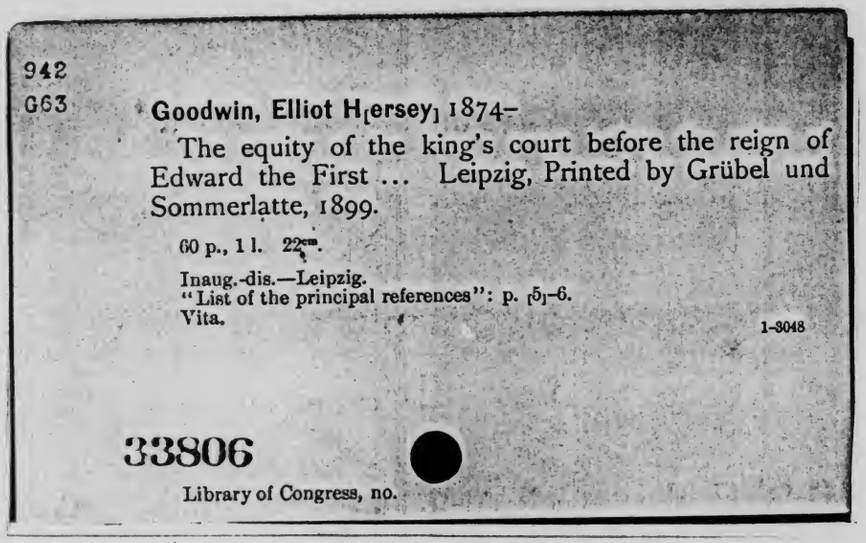

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Goodwin, Elliot H[ersey] 1874–

The equity of the king's court before the reign of Edward the First ... Leipzig, Printed by Grübel und Sommerlatte, 1899.

60 p., 1 l. 22cm.

Inaug.-dis.—Leipzig.
"List of the principal references": p. [5]–6.
Vita.

1-3048

33806

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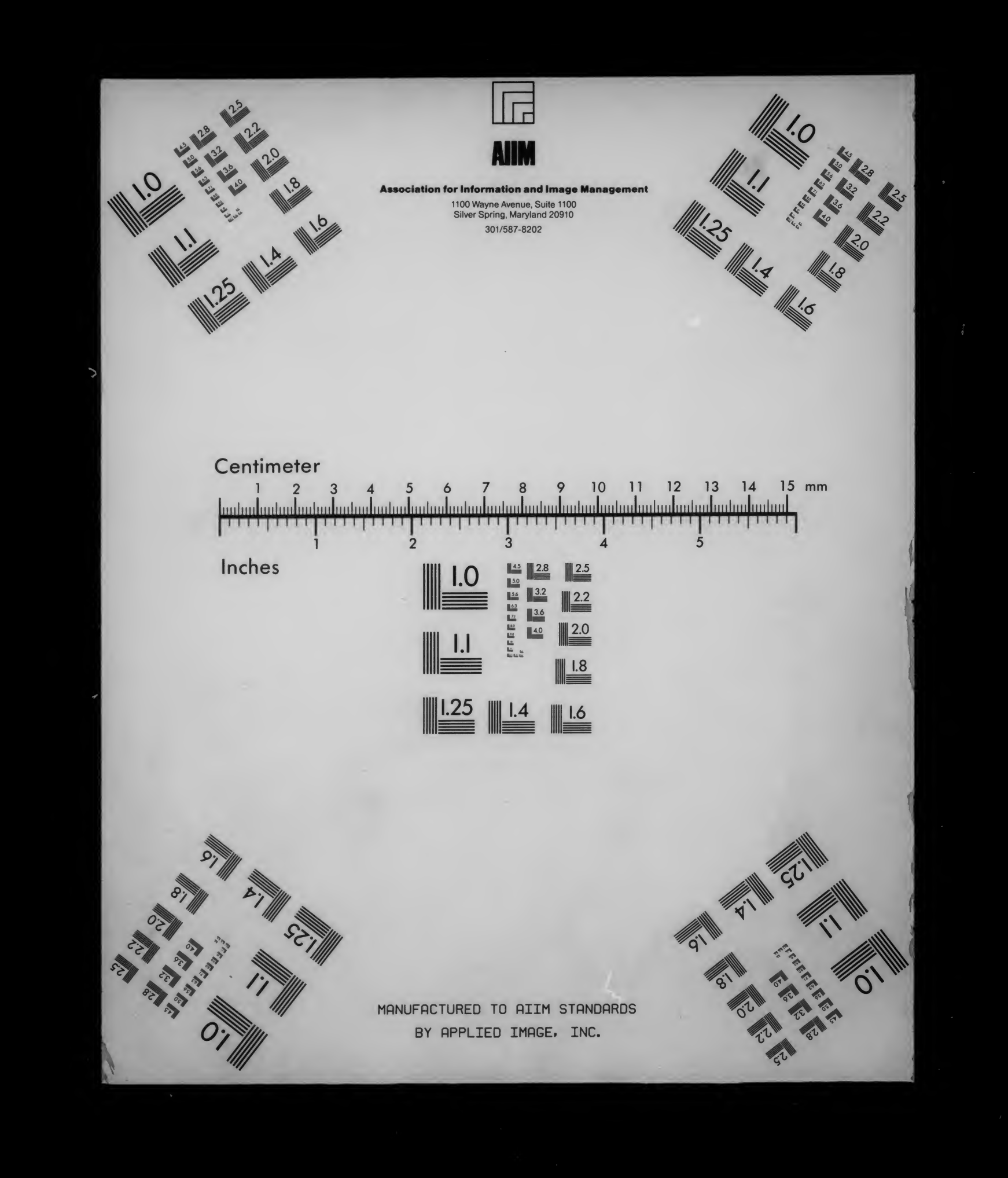
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THE EQUITY OF THE KING'S COURT

BEFORE THE REIGN OF

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PRESENTED TO THE PHILOSOPHICAL FACULTY OF THE UNIVERSITY OF LEIPZIG FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

BY

ELLIOT H. GOODWIN

OF CAMBRIDGE, MASS., U. S. A.

PRINTED BY GRÜBEL & SOMMERLATTE IN LEIPZIG

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TO MY FATHER.

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It is a great pleasure to acknowledge at the beginning my debt of gratitude to Professor Lamprecht of Leipzig, Professor Liebermann of Berlin, and Dr. Salomon of Leipzig, for their invaluable advice in the preparation of this essay.

Leipzig, Aug. 6, 1899.

ELLIOT H. GOODWIN.

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INTRODUCTION.

I.

An essay which according to its title treats of equity in England must arouse in the reader's mind the vision of that famous equitable jurisdiction of the chancery which is such an important feature in the history of the English law during the last five centuries. But I write of a period in which such an equitable jurisdiction did not exist; this study closes at a point almost a century before the time to which the learned writers on equity have traced back the evidence of an equitable jurisdiction in the chancery. It closes at the beginning of the history of council and parliament as courts of equity; and with the earliest extant references to chancellor and chancery of matters calling for a judicial consideration. It is only in attempting to show how and where equity was exercised in an earlier period, a period by the end of which the common law had grown to very considerable dimensions both in doctrine and procedure, that I can hope to shed any light on the problem of the later rise of the chancellor's extraordinary jurisdiction.

But that the equity exercised by the king and by his courts, the equity of which Glanvill and Bracton speak, stands in an important historical relation to that later equity exercised in chancery, no one, I think, can reasonably doubt. The special doctrines which comprise later equity sprang up only when the want for them was felt; and this was not in the time before Edward I. But the problem remains why, when new remedy was wanted, the common-law courts failed to provide it and why it fell to the chancellor to provide it? The answer to these questions lies in the power and limits of the common-law courts to grant extraordinary relief, and in the position and character of the chancellor. Writers on equity, however closely they may define it, while remaining chiefly interested in the origin of those equitable doctrines which have come down as such to modern times,

have, in seeking the derivation of the chancellor's equitable jurisdiction, gone back of the Calendars of the Proceedings in Chancery to the extraordinary jurisdiction of king, council and courts. It may be well to begin at the other end, and show how equity, in a much broader sense of the word, was administered from the earliest times down to the reign of Edward I.

The word equity is used in three different senses:[1]—

First, that is called equity which is founded on natural justice.[2] To say an act or a law is equitable in this sense is to say that it is morally right or just; and thus Glanvill and Bracton speak of an institution or a law as founded on equity or "natural equity." But this "natural equity", which may well stand as the basis of law, is too broad and general to be administered in connection with a system of law; the attempt to administer it would undermine all system.[3]

The second sense in which equity is used, which may be well called the Roman sense, gives us an equity capable of practical application. All law must be defective because of its universality; equity is that which comes in aid of law to mitigate its severity, or to give remedy where the rigor of the law allows of none.[4] This is the foundation of the jurisdiction of the Roman praetor; he had no power to overthrow the positive law, but was bound to stand by it in all cases to which it was justly applicable. It is of this equity in the Roman sense that I have in this essay to treat.—*aequitas* as distinguished from the *rigor juris*.

A third sense in which the word equity is used is that specially English equity developed in the court of chancery,—equity in the sense in which that term is used in the courts of England and America today. For this no better definition has been found than that of Story,—"Equity jurisprudence may therefore, properly be said to be that portion of remedial justice which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a court of common law."[5]

[1] In these definitions I follow Story, Equity Jurisprudence, Vol. I., ch. I.

[2] Story, I., p. 1; cf. Bracton, f. 4.

[3] Cf. Pollock and Maitland, II., p. 670,—speaking of the age of Glanvill and Bracton,—"There was the danger of a premature and formless equity."

[4] Story, I., p. 4; cf. Hardy, Introduction to the Close Rolls, p. xxiv.

[5] Equity Jurisprudence, I., p. 26.

A connection between equity thus defined and equity in the two forgoing senses is not apparent. Further, it must be said, that this English equity does not attempt to mitigate the rigor of the common law.[1] The judges in equity exercise no wider discretion in the interpretation of the law according to its spirit rather than its letter than the judges of the common law[2], and they are in like manner bound by precedents in giving their decisions.[3] Equity takes cognizance of certain rights which the common law does not recognize,[4] gives another kind of remedy where both have jurisdiction over the same subject[5], and the procedure in equity is different from the procedure of the common law.[6] But that the chancellor in the early exercise of his jurisdiction was so strictly bound by rules and precedents as this is by no means to be supposed. On the contrary, he acted on principles of "natural equity" or conscience.[7] Present equity is due to a long process of definition.

That the Roman conception of equity should have found its way into England cannot be a matter of surprise when one considers the influence of the Roman law in England. This subject has been handled by many writers.[8] I need only to speak in this connection of the traces of the Roman law in the Leges Henrici Primi,[9] in the Dialogus de Scaccario,[10] in Glanvill[11], and in Bracton.[12] Glanvill, in his prologue in imitation of the Institutes, has much to say of equity. Both in his book and in Bracton's the word is constantly recurring, and often the application of equity in the special case is noted. Bracton's book,

[1] Story, I., p. 14. Black. Comm., III., pp. 429-430.

[2] Story, I., pp. 16-17. Black. Comm., III., pp. 430-431.

[3] Story, I., p. 19. Black. Comm., III., p. 432.

[4] Story, I., p. 28. Black. Comm., III., p. 438.

[5] Story, I., p. 29. Black. Comm., III., 438-439.

[6] Story, I., pp. 29-30. Black. Comm., III., pp. 437-438.

[7] Cf. Story, I., p. 23. Black. Comm., III., p. 433. Kerly, pp. 1—2.

[8] See especially Scrutton, The Influence of the Roman Law on the Law of England (Cambridge, 1885). Pollock and Maitland, Bk. I., ch. IV.

[9] Liebermann, in Forschungen zur deutschen Geschichte, XVI., (1876), pp. 582-586. Pollock and Maitland, I., p. 78.

[10] Liebermann, Einleitung in den Dialogus de Scaccario, (Göttingen, 1875), pp. 32, 95.

[11] Pollock and Maitland, I., p. 144. Spence, I., p. 123.

[12] Pollock and Maitland, I., 186-187. Scrutton, Pt. II., ch. 3, Güterbock, Henricus de Bracton und sein Verhältniss zum römischen Recht (Berlin, 1862). Maitland, Introduction to Bracton and Azo (London, 1895).

"Romanesque in form English in substance,"[1] owes much to the Summa Azonis, and among other things its definition of equity.[2] For the court of the Roman praetor, Glanvill and Bracton find no parallel in England; they see a like power exercised by the king and by his courts.

II.

If it would seem to be true that Glanvill and Bracton borrow their conception of equity from the "aequitas" of the Roman law, they are, nevertheless, but applying new terms to an institution as essentially Teutonic as Roman. In the early Germanic state,[3] the king exercised a jurisdiction based on broader principles of right and justice than that of the ordinary tribunals; he was not in a like degree bound down to the formality of the law and could decide the case before his court according to principles of equity. The Frankish king of the Merovingian period granted to those whom he had taken into his special protection a writ containing the privilege of withdrawing their suits from the local courts in favor of the king's court, there to be decided "secundum aequitatem."[4] In the Carolingian period, the man who had suffered from the strictness and formality of the ordinary court might seek alleviation (moderatio) before the king. It was a maxim that the king's court was competent to give relief in all cases. It stood open to those to whom the ordinary courts had failed to give a remedy, it offered procedural advantages, such as the "inquisitio," not to be had in the local courts and it alone allowed a party to a suit to appear by a representative in cases of real necessity. Although the Roman law, which reserved the exercise of equity for the "consistorium principis," may well have had its influence on the court of the Frankish kings, nevertheless, as Professor Brunner clearly points out,[5] the fact that the same equitable jurisdiction existed in Anglo-Saxon England, in Iceland, and in Sweden proves its origin as a Germanic as well as a Roman institution.

[1] Pollock and Maitland, I., p. 186; cf. Scrutton, pp. 119-121. Güterbock, pp. 31-41, Spence, I., pp. 123-124, Maitland, Introduction to Bracton and Azo.

[2] Infra, p. 38 n. 1.

[3] For this whole subject see Brunner, Deutsche Rechtsgeschichte, II., 135-136.

[4] The "Mundbriefe." Brunner, D.R.G., II., 50 and 52.

[5] D.R.G., II., 136.

The evidence points to the same exercise of a non-ordinary and equitable jurisdiction by the Norman dukes before the conquest of England. The "curia ducis" was modelled after the court of the Frankish kings, and in general the Frankish law was retained. The duke's court offered the "inquisitio" as an equitable mode of proof instead of the duel, to which the procedure in the local courts came more and more to lead.[1] But the scarcity of legal sources makes it difficult to trace the history of this extraordinary jurisdiction in Normandy, while the legal institutions derived from the Anglo-Norman kings develop much more rapidly and fully in England.

[1] Brunner, Quellen des norm. Rechts in Holtzendorff's Encyklopädie, p. 324. Pollock and Maitland, I., pp. 43, 50.

CHAPTER I.

THE EXTRAORDINARY JURISDICTION OF THE ANGLO-SAXON KINGS.

The conclusions of Professor Brunner as to the power of the Germanic king to grant equitable relief find strong confirmation in the laws of the Anglo-Saxons. True, the king has no regularly organized court and his Witan has no clearly defined jurisdiction. But the passage in Asser's Vita Aelfridi,[1] in which he describes the king as the guardian of justice and equity as against the ignorance and oppression of the presiding officers of the public courts, is not merely rhetorical. The laws of Ine, Aethelstan, Aethelred, Edgar, and Canute prove that the king was looked to to round out the system of justice administered in the hundred and county courts, to give alleviation[2] where injustice had been done through the strictness and formality of the law, or when justice was not to be obtained because of the power or influence of one of the parties.

In Ine's laws, the Ealdorman who allows a thief to escape or conceals a theft is to lose his shire unless the king take compassion on him.[3] In the Judicia Civitatis Lundoniae, he that kills a man in avenging a thief shall forfeit his life and all that he has unless the king take compassion on him.[4] In like manner, the king can remit the death penalty to a counterfeiter[5] and soften the punishment of the criminal who has sought sanctuary.[6] More important is Edgar's Secular Ordinance, Chap. II,—

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[1] Monumenta Historica Britannica, p. 497; cf. Zinkeisen, in Political Science Quarterly, X., p. 135.

[2] In Anglo-Saxon "Lihting."

[3] "buton him kyning ârian wille." Ines Gesetze, c. 36 § 1. Schmid, Gesetze d. A.S., p. 36.

[4] Aethelstans Gesetze, VI. c. 1 § 5. Schmid, p. 158.

[5] Aethelreds Gesetze, c. 3, § 16. Schmid, p. 218.

[6] Be griðe and be munde. c. 16. Schmid, p. 386.

"And let no man apply to the king in any suit, unless at home he may not be worthy of law, or cannot obtain law. If the law be too heavy let him seek a mitigation of it from the king; and for any 'bot'-worthy crime let no man forfeit more than his 'wer.'"[1]

This law is to prevent application to the king in the first instance; the king's jurisdiction is to be sought only in case of failure to obtain relief in the ordinary courts. Two causes are given for this failure. In the first sentence the ill-will of the magistrate or the protection of some powerful lord is referred to; and of this Pollock and Maitland well say,—"It is obvious that the process was barely distinguishable from that of combatting an open rebellion."[2] But the second part allows a man to seek the jurisdiction of the king to mitigate the harshness of the law itself; that is, in cases of failure of the local courts to adjudge equitable penalties.[3]

The need of such a power in the hands of the king to mitigate the law can be easily understood if we consider the formal procedure and the exact system of penalties, characteristic of early Germanic law, prevailing in the Anglo-Saxon ordinary courts, which seem scarcely to allow of any exercise of equity. The assembled suitors adjudged the mode of proof; and when by oath or by the "judgment of God" the accused was found guilty, his only hope of avoiding the penalty, whether equitable or not, seems to have lain in the king. Perhaps the bishop, who sat in the county court, exercised an influence toward "tempering justice with mercy". Canute's Charter[4] would lead us to think so; but the part he took in secular legislation is by no means clear.[5]

In the period following the Norman Conquest, we find this

[1] Stubbs, Sel. Charters, p. 71. Schmid, p. 188. This law is repeated by Canute, Secular Dooms, Chap. 17. Sel. Charters, p. 73. Schmid, p. 280.

[2] Pollock and Maitland, I., p. 17.

[3] But the terms of this law do not, I think, allow of speaking of an "unbeschränkte Dispensationsbefugnis" in the hands of the Anglo-Saxon king. Karl von Amira in Paul's Grundriss der germanischen Philologie (Strassbourg, 1893), pp. 128--129.

[4] "And also I command all my reeves, by my friendship and by all that they own, and by their own life, that they everywhere hold my people rightly and judge right judgments by the shire bishop's witness, and do such mercy therein as the shire bishop thinks right that a man may attain to." Stubbs, Sel. Chart., p. 76; cf. Edgar, Secular Ordinance (III), c. 1 and 5. Sel. Chart., p. 71, Schmid, pp. 188, 190.

[5] Pollock and Maitland, I., pp. 16—17.

jurisdiction of the king and of the king's court on a much larger scale than that exercised by Edgar and Canute. It develops until the jurisdiction of the hundred and county courts, the regular courts of the Anglo-Saxon period, fall entirely into the background. The king's justice, systematized through the reforms of Henry II., comes to supersede almost all their functions, and his courts become the common-law courts of the realm.[1] This great increase in the king's jurisdiction has led some writers to trace back the equitable jurisdiction, and, along with that, the later equitable jurisdiction of the chancellor, to Frankish-Normannic influences.[2] But this increase in extraordinary jurisdiction is intimately connected with the increase of royal authority; the jurisdiction of William the Conqueror and his successors is that of Edgar and Canute raised to a higher power. As king of a conquered country, the Norman ruler became more absolute than his Anglo-Saxon predecessor, his justice more arbitrary and capable of greater development. But he wished to be an English king; he restored the laws of Edward the Confessor, and the local courts were continued. His jurisdiction was necessary, as in Anglo-Saxon times, to fill out the system of justice, while the introduction of feudalism made the king's court at the same time a court for his great vassals. As such it appears down to the reign of Henry II., who, by his assises a century after the Conquest, changed its character and procedure and thus made it the most important organ of justice in the realm.[3] Frankish precedents, no doubt, had their influence; but before as well as after the Conquest, the extraordinary or equitable jurisdiction of the king, as well as the main part of the common law, had its origin in England.

[1] Cf. Pollock and Maitland, I., p. 17. Gneist, Engl. Verfassungsgeschichte, p. 150.

[2] Brunner, Deut. Rechtsgesch., II., p. 136 n. 8. "Bekannt ist die hohe rechtsgeschichtliche Bedeutung, welche die equitable iurisdiction in England besitzt. Fusst sie zunächst auf der fränkisch-normannischen Praxis des anglo-normannischen Königtums, so fand sie doch, wie Edgar III. 2 ergiebt, schon im angelsächsischen Rechte einen Anknüpfungspunkt." Cf. Brunner, Quellen des normannischen Rechts in Holtzendorff's Encyklopädie, p. 324.

[3] Cf. Stubbs, Const. Hist., I., pp. 366, 421.

CHAPTER II.

THE EQUITABLE POWER IN THE KING'S PERSON.

In treating the subject of the exercise of equity after the Norman Conquest, it seems advantageous to distinguish as far as possible between that which lay in the king and that which his courts apart from him had power to exercise. The former, down to the time of Edward I., is practically unlimited; of the latter it is the special object of this essay to define the boundaries and to show how much discretion the justices of the different courts might use in deciding the special case apart from the general rule. To make this distinction is, however, especially in earlier times, not always easy, sometimes impossible, and this from the nature of the case. The king is the source of justice and equity: by his coronation oath he swears to exercise both.[1] He sits in court as the highest judge in the kingdom throughout the period of which we are treating, and later. His justice, which comes practically to supersede all other forms except that of the ecclesiastical courts, may be well looked upon as delegated by him to his justices, together with a certain power to give equitable relief. But he reserves a part for himself alone, nor does this delegation, for the time being, deprive him of his right to do ordinary justice himself. It is first with the beginning of the plea rolls, more particularly of the plea rolls of the separate courts, that the procedure of the justices apart from the king may be effectively distinguished.

The king with the advice of his counsellors makes new laws.[2] This has a direct bearing on equity for by this means

[1] The coronation liturgy; see Pontificale Egberti, Stubbs, Select Charters, p. 62, Oath of Aethelred, Schmid, Einleit., p. L. William Rufus, following this form, promises Lanfranc,—"justitiam, misericordiam et aequitatem se per totum regnum, si rex foret servaturum." Eadmer, Hist. Nov. (Rolls Series), p. 25, cf. Bracton, f. 107, Stubbs, Const. Hist., I., pp. 161, 366.

[2] Pollock and Maitland, I., pp. 160-161, Stubbs, Const. Hist., I., p. 593, II., pp. 252, 599, Gneist, Verf. Gesch., pp. 455, 456.

many equitable requirements are fulfilled. The introduction of the inquisition and jury, the assises of Henry II., provided an equitable procedure in the king's court compared with that of the hundred, county and manorial courts; and one to which a free man in almost every case, except ecclesiastical causes, might attain. Thus Glanvill describes the grand assise as an equitable institution by which the duel might be avoided.[1] The appearance of new cases and the petitions in parliament sometimes gave occasion for new ordinances and statutes.[2] The judges' power to interpret the law was narrowed by this prerogative; when new and important points arose the case was generally postponed for a consultation with the king.

Such cases are numerous. In Doomsday, in a plea of land, where the plaintiff brought forward witnesses of the best and oldest men of the county and hundred, and the defendant villeins, low people and bailiffs, who wished to prove his right by oath or ordeal, the witnesses of William, the plaintiff, declared themselves unwilling to accept any law except that of King Edward until it should be defined by the king.[3] The plea rolls furnish many examples. In 1194 occurred the famous case between Bishop Hugh of Coventry and the canons. The archbishop of Canterbury sought cognizance of the case for his court as of a plea concerning a vacant church, the justices for the court of the king as of a plea concerning a barony. The case is to go before the king to learn his will.[4] In Michaelmas, 1201, a case in which the plaintiffs had failed to appear or essoin themselves at the election of the grand assise is postponed to another day,—"et interim consulendus est Dominus Rex, sciliter utrum debeat hujusmodi assisa procedere: necne".[5] An interesting case in John's reign, as to whether the nephew, son of the elder brother, or the younger brother of the dead man is the next heir,

[1] Glanvill, II., c. 7. "Ex aequitate autem maxima prodita est legalis ista institutio.....Praeterea quanto magis ponderat in judiciis plurium idoneorum testium fides quam unius tantum, tanto majore aequitate nititur ista constitutio quam duellum." Cf. Stubbs, Const. Hist., II., 267.

[2] Memoranda de Parliamento, No. 96; where the case of the petitioner gives rise to an ordinance against those misusing the king's protection.

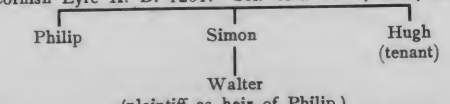
[3] "Lands of Hugh de Port." Placita Anglonormannica, p. 38, from 1 Doomsday, 44 b.

[4] "Et pro hac lite et contencione voluntatem Domini Regis consideratum est consulere." Rot. Cur. Reg., I., p. 67, Placit. Abbrev., p. 5. See Palgrave, Introduction to Rot. Cur. Reg., I., pp. 18-22.

[5] No. 87. Select Civil Pleas.

was left to the king to decide; this, however, without doubt, because the recognition of the right of the nephew, whom both Glanvill and Bracton think should be the heir, would have been in opposition to John's claim to the throne.[1] In Henry III.'s reign, a case "coram rege" as to the "courtesy of the law of England", over which the justices were not agreed, led to its definition by the king; by which the second husband, claiming by courtesy is preferred to the son by the first husband claiming as heir.[2] Some of the cases left to the king call rather for a lenient interpretation in the special case than for a definition of the law. The case of Reginald Tailebois vs. Gilbert the Invalid and his wife, from Trinity term 1194, is a good example. Gilbert failed to appear in answer to the summons and therefore, the land in question was seized into the hands of the king and held for the term of two weeks, during which they failed to replevy it. On the day set for them to hear their judgment, the wife appeared and produced Gilbert her husband, a leper, who said the land was the right of his wife and that he could not nor did he wish to plead as to it. His wife sought the judgment of the court as to whether she ought to plead without him. The plaintiff sought judgment for himself because the defendants did not deny the summons and had failed to replevy the land within the term allowed. This would be according to strict law a good plea;[3] but the case of the defendants called for an exercise of equity, so judgment is postponed until the will of the king should be known.[4] Many other cases might be cited, but enough have been given to show that resort was made to the king for a definition of the law in new or difficult cases. The king might

[1] Cornish Eyre A. D. 1201. Sel. Civil Pleas, Ibid., No. 194.



(plaintiff as heir of Philip.)

See Glanvill, VII. c. 3, Bracton, f. 64 b., f. 267 b., f. 327 b. The plaintiff in this case seeks by an assise of Mordancester, which Bracton (f. 267 b.) says is not allowed on account of the near relationship, but the plaintiff does not go "sine die" on this account; "judicium pendet ex voluntate Domini Regis" because of the "Casus Regis", for a discussion of which see Pollock and Maitland, II., p. 283.

[2] 21 Hen. III., Bracton's Note Book, No. 1182.

[3] Glanvill, I., c. 16, Bracton, f. 364 b.

[4] Three Rolls of the King's Court, Rich. I., p. 8.

also be called upon to mitigate the "rigor juris" in the special case, though the justices possessed this power to a certain degree as will be shown later.[1]

The king's pardoning power is of prime importance among the different forms at the king's disposal for exercising equity. To this power to pardon must be attributed very wide limits, for there does not seem to have been any constitutional means of controlling the king in the arbitrary use of it. On the whole, however, it could not have been much abused, for the justices are to be found supporting and making large claims for it, and the first real protests against a prerogative, which might well have tended to undermine the authority of the courts, came from parliament, in the reign of Edward III., when the commons complained that pardons were so easily obtained that murder and felony were committed without restraint.[2] This was probably directed against the pardons given to those who would serve in the army.

Pardons were granted as well after as before judgment. The Patent and Close Rolls, especially the former, record a great many on very diverse subjects. Thus pardons of debt,[3] judical amercement,[4] trespass,[5] forest offences[6], and all sorts of felony are continnally recurring. A large part of these were arbitrary with no relation to justice and equity. The statement

[1] No. 262, Bracton's Note Book, is a case "in banco" (11 Hen. III.), in which the jurors of the grand assise gave a verdict for the tenant. Afterwards the plaintiff, the Prior of le Waast, came forward with such strong proof in the way of charters that judgment was postponed to consult the king and justiciar. By strict law judgment should have been for the defendant, for no attaint of a grand assise is allowed. (Bracton, f. 290-290 b.) The only remedy lay in the king's extraordinary power. See also Rot. Cur. Reg., II., pp. 133-134: "Nichil capiat per assisam istam nisi per voluntatem Domini Regis." Bracton's Note Book, No. 743, where "postea, coram Dom. Rege et de consilio suo," it is adjudged that wardship does not pertain to the king on account of a petty serjeantry (see footnote to case). Also Northumberland Assise Rolls, pp. 237-8, where reference is made to a judicial decision, "coram Domino Rege et ejus consilio," that "cornage" should not, in Northumberland, be a ground for having wardship.

[2] Stubbs, Const. Hist., II., p. 613.

[3] Calendar of Patent Rolls, Edw. I. (1281-1292), pp. 148, 150, 169, et passim. Rotuli Litterarum Clausarum, pp. 4, 5, 8 etc. Cf. Calendar of Close Rolls, Edw. II.

[4] Cal. of Pat. Rolls, Edw. I. (1281-1292), pp. 370, 428, et passim.

[5] Rot. Litt. Claus., p. 580 etc.

[6] Cal. of Pat. Rolls, Edw. I. (1281-1292), pp. 232, 236, 268, et passim.

that the pardon was granted "at the instance of" some influential person occurs constantly, and the fact of a friend at court excused many from the worst crimes. Thus, in 1284, Robert de Aleburne obtained a pardon for violating sanctuary at the instance of the queen-mother.[1] In 1301, John de Bonyngton was pardoned at the instance of Marmaduke de Twenge, for the death of Thomas de Heslerton, for the rape of a certain Beatrice, for robberies and other trespasses, and for any consequent outlawry.[2] Less reprehensible, but also not tending to the lessening of crime, are the pardons on account of past services[3] or on condition that the criminal should enter the army.[4] The pardon of outlawry was most common. This was often granted because by the record of the king's justices, the man who had been declared an outlaw by the county court was not guilty of crime.[5] Frequently, in the plea rolls of the justices in eyre, it will be recorded that the jurors presented a man as suspected of felony, who then appeared before the court and produced the king's writ of pardon. This stopped all proceedings against him as far as the king was concerned, though a personal appeal, if made at once, might still be brought against him.[6] But here is to be observed a limit to the king's pardoning power. His writ would protect against the suit of the king, but it could not interfere with the right of appeal which had existed long before the introduction of crown pleas.[7] Again, the king's pardon of outlawry did not restore to the pardoned man his forfeited lands. They had escheated to the lord of the outlaw and he might recover them only by the grace of that lord.[8] "Forisfacturam autem et utlagariam solet dominus Rex damnatis remittere, nec tamen aliena jura ideo querit infringere",

[1] Cal. of Pat. Rolls, Edw. I. (1281—1292), p. 125.

[2] Cal. of Pat. Rolls, Edw. I. (1301—1307), p. 4. For similar cases see *ibid.* (1281-1292), 159, 218 etc., Matt. Par. Chron. Maj., V., p. 663, Placit. Abbrev., p. 227,—"Et ob affinitatem cum Rege perdonantur plurima." (20 Edw. I.) Also *ibid.* pp. 150, 169, 176, 179.

[3] Cal. of Pat. Rolls, Edw. I. (1301-1307), p. 4.

[4] Placit. Abbrev., pp. 236, 248.

[5] Cal. of Pat. Rolls, Edw. I. (1281-1292), pp. 325, 436, 488 etc.

[6] Select Pleas of the Crown, Nos. 47, 134, 171. See Bracton, f. 131 b, for examples of such writs of pardon.

[7] Cf. Pollock and Maitland, II., 481.

[8] Placit. Abbrev., p. 229 (Nott'), is a case where the king, "ex gratia sua," allows the son of a felon to have his father's lands which had escheated to R. de Bello Tofto and G. his wife; but this on the ground that his father had died in prison before he was convicted.

says Glanvill;[1] and Bracton,—"Non enim poterit rex gratiam facere cum injuria et damno aliorum".[2]

Two cases in which a pardon was regularly granted call for special mention; homicide in self-defence and homicide through misadventure.[3] It is clear that the justices had no power to set the man free who had killed another in either of these two ways; the most that they could do was to recommend that the king should pardon him. This is the conclusion Pollock and Maitland have reached[4] and it is the only tenable one; the seeming exceptions can be explained in other ways. The regular course is that the jurors present the killing as happening "per infortunium" or "se defendendo", as the case may be, and to testify that the killer is not "malecreditur". No judgment is given but simply a "loquendum cum domino Rege".[5] In a case of self-defence, (21 Hen. III.) it is especially noted that "Dom. Rex de gracia sua et non per judicium perdonavit ei mortem illam et similiter fugam quam fecerat pro morte illa".[6] If the slayer in self-defence or through misadventure had fled and was "malecreditur" by the jurors, the justices ordered him to be exacted and outlawed.[7] The seeming exceptions to these rules, where the justices allow the slayer to go free on their own authority, can be explained on the ground that the slain man was a thief,[8] or because the deed took place in time of war,[9] even in one

[1] VII., C. 17.

[2] Bracton, f. 132 b. Cf. Rot. Parl., I., p. 51. No. 71 (18 Edw. I). "Pueri Wilhelmi de Parles, qui injuste fuit suspensus prout postea per confessionem aliorum lequebat, petunt quod Rex eis gratiam faciat de terris patris sui. *Responsio:* Rex nihil facere potest." Bracton's Note Book, No. 840: A case without a judgment in the bench (18 Hen. III.), in which the tenants claimed the right to the lands of a pardoned outlaw on the ground that the outlawry was lawfully promulgated, and the pardon did not restore what had thus lawfully escheated to them.

[3] These cases fully discussed in Pollock and Maitland, II., 477—483.

[4] Pollock and Maitland, II., 477. Cf. Brunner, Zeitschrift für Rechtsgeschichte, XIV., p. 167.

[5] Such cases are: Northumberland Assise Rolls, pp. 111, 361, 363, 385 (in defence against rape), Select Pleas of the Crown, Nos. 70, 114, 188. Cf. Ibid. 113, "Loquendum cum Rege de quodam stulto qui est in prisona eo quod per demenciam cognoscit se esse latronem set non est culpabilis."

[6] Bracton's Note Book, No. 1216. Were it not for the pardon of the flight his chattels had been forfeit. See Pollock and Maitland, II., p. 479.

[7] Northumberland Assise Rolls, pp. 319, 322, 323.

[8] Select Pleas of the Crown, No. 145.

[9] Ibid. No. 133.

case, where the slayer thought he was attacked by a thief who had broken into his house.[1] The explanation of the cases in which the slayer had fled but was not "malecreditur," when the judges say he may return,[2] is given by Pollock and Maitland, in that the "redeat" did not mean that he was quit, for he would still have to stand his trial if anyone wished to appeal him[3]; but it also seems to mean that the king's pardon of what pertained to him would follow as a matter of course. The great number of these pardons recorded in the Patent Rolls[4] also point to the same conclusion, that the pardon of homicide in self-defence or through misadventure was a matter of course.

Either the justices bore record to the fact that the killing was in self-defence or through misadventure, or the pardon was based on a special inquisition made by order of the king. The necessity for the king's pardon in these cases, which is certainly an equitable exercise of his pardoning power, but one which it seems might well have lain in the power of the justices, is explained historically from the old system of "wer" and "wite";[5] to which might be added, that it was kept up after the pardon had become a matter of course because of the money involved. It is not to be believed that the king's writ of pardon was given away gratis,—the fines paid for being restored to the king's peace are recorded in the pipe rolls[6]; but the amount seems to have varied according to the wealth of the man seeking pardon, and probably, in cases of poverty was, according to the general rule, entirely remitted.[7]

Leaving the subject of the king's pardoning power to turn to other points in regard to the king's relation to justice, it is to be noted that a special class must be made for cases in which the king was particularly interested, either as plaintiff or as defendant. The king was defendant only by his own will,

[1] Northumberland Assise Rolls, p. 94.

[2] Ibid. pp. 323, 341, 343, 348, 362.

[3] Pollock and Maitland, II., p. 477 n. 5.

[4] See Calendar of Patent Rolls, Edw. I., passim. Cf. Pollock and Maitland, II., 478, Northumberland Assise Rolls, pp. 98, 360, Bracton, f. 134,—"Tenetur etiam [rex] aliquando de gratia concedere ei vitam et membra ut si per infortunium vel se defendendo hominem interfecit."

[5] Pollock and Maitland, II., p. 481.

[6] Pipe Rolls 31 Henry I., pp. 91, 102, 2, 3, 4 Henry II., pp. 53, 66. See also Y. B. 30-31 Edw. I., p. 503, "ces amys tant cour il fut en prison purchacerent la chartre le Roy de la sute de sa peez."

[7] See infra, pp. 31-32, as to pardons "pro paupertate."

or, in other words, by a special act of grace. Bracton says a writ does not run against the king,[1] and, again, of the assise of novel disseisin, that no one is entitled to it if he has been disseised by the king unless the disseisin has been manifest, in which case he may expect the king's grace.[2] Henry III. even went so far as to issue an edict that no writ should issue from the chancery against his brothers.[3] From the fact that the king could not be impleaded, it followed that when a suit for land was brought against a man who claimed to hold in chief of the king, the justices could not decide the case without the king.[4] For, as there was no remedy but of grace against the king if he disseised, so there was no remedy, but with the king's will, against him whom the king had put in seisin. This was the cause of many petitions in parliament; that the king would allow the suit against his tenant-in-chief to proceed, after it had been postponed indefinitely on this ground.[5] Indeed many of the petitions in parliament prayed remedy of the king's grace, as he could not be sued, that he should carry out what he had promised, or pay wages, or grant relief against those misusing the protection of the king.[6]

In the position of the king as plaintiff there is little to note

[1] f. 5b. "Cum breve non currat contra ipsum."

[2] f. 168b,—"Item nulli competit assisa qui per dominum regem vel ballivos suos nomine suo fuerit disseysitus, nisi manifesta fuerit disseysina, & quo casu erit voluntas domini regis exspectanda." See also Bracton's Note Book, No. 76 and note (Maitland). For the statement in Y. B., 33—35 Edw. I., p. 471 "e dautre part en auncien temps chescun bref e de dreit e de possessioun girreit ben ver le roi," see Pollock and Maitland, I., p. 500. An interesting passage as to the king's right to disseise occurs in the Chirograph between John and Longchamp, 1191, (Hoveden, III., p. 136),—"Sed et concessum est quod episcopi et abbates, comites et barones, vavassores et liberi tenentes, non ad voluntatem justitiarum vel ministrorum domini regis de terris vel catallis suis dissaisientur, sed judicio curiae domini regis secundum legitimas consuetudines et assisas regni tractabuntur, vel per mandatum domini regis."

[3] (A.D. 1256). Matt. Par. Chron. Maj., V., 594.

[4] Rot. Cur. Reg., I., p. 41, Abbrev. Placit., pp. 145-146. Cf. Pollock and Maitland, I., p. 501, Y. B. 20-21 Edw. I., pp. 383-393, 33-35 Edw. I., p. 539. As to vouching the king to warranty see Bracton, f. 382b.

[5] Memoranda de Parliamento, 1305, No. 77,—R. says that in a case in which he was plaintiff the defendant asserted that he could answer without the king; and petitions "Quod rex inde dicat voluntatem suam, &c."—Ita responsum est: "Rex vult quod respondeat et quod justiciarii procedant, sed certificent regem super hoc ante redditionem judicii, &c."

[6] Memoranda de Parliamento, 1305: Nos. 56, 96, 272, &c. See Maitland, Introduction, p. lxviii.

with a special relation to equity. Whether pleading in person or by attorney he had certain privileges over all other plaintiffs. In the Year Books it is often said that the king is prerogative.[1] Such a prerogative was, for instance, the rule that time does not run against the king.[2] Further claims are made from time to time by the king's lawyers;[3] but, on the whole, these prerogatives of the king at law are explainable on just grounds and are not of great importance.[4] When the king had to complain of his immediate vassals, the case is worth noticing on account of his peculiar position as plaintiff, as over-lord, and as ultimate judge. Even after Magna Carta the king acted arbitrarily in regard to his immediate vassals and ministers.[5] As a rule, he demanded the judgment of his court against the erring vassal, which recommended him as worthy of such and such a punishment; but it remained for the king to carry it out or to exercise grace. Thus, in the well-known case of Nicholas de Segrave, the king obtained a judgment of his court that he merited death; but he saw fit, "de gratia sua speciali", to remit this punishment and to allow him to go free on finding sufficient pledges.[6] The accused often preferred to place himself on the king's mercy rather than on the judgment of his court.[7]

It remains to speak of the king's interference in the course of justice to alter the procedure or judgment. From what has been said before, it will not appear strange that the king possessed

[1] Y. B. 20-21 Edw. I., pp. 57, 69, 73, 113; 21-22 Edw. I., p. 75. Cf. Pollock and Maitland, I., p. 496.

[2] Bracton, f. 103, Y. B. 20-21, Edw. I., p. 69.

[3] Placit. Abbrev., p. 192, (Michaelmas 4-5 Edw. I.) "attornatus dicti Regis dicit quod Rex habet quandam specialem prerogativam et cons-[ilium] per quod quandocunque dederit aliquod manerium ad quod pertinet advocacio ecclesie quod ipse retinet sibi donacionem illius ecclesie nisi Rex fecerit mencionem in dono suo de advocacione illa." Judgment is therefore given for the king.

[4] See Pollock and Maitland, I., p. 496.

[5] See, for example, the complaint of the Prince of Connaught before the king against John de Burgh, the son of the famous justiciar, demanding judgment for the devastation he had made. The king, without hearing John in his own defence, wrote to the magnates of Ireland,—"ut exterminato Johanne, regem in regno suo constitutum et in pace bona confirmatum." Matt. Par. Chron. Maj., IV., 57-58.

[6] Memoranda de Parliamento, 1305: No. 449, cf. No. 453.

[7] Matt. Par. Chron. Maj., V., p. 95 "Walterus coram rege convictus, non ausus subire judicium, sed misericordiae domini regis supponens, mortem vel exhaereditationem vix evasit." See also Ibid. V., 103-104; case of Gaston de Bearn.

this power to interfere. Sometimes it was used in the interests of equity, but often merely arbitrarily. The justices seem to have made it a point to distinguish in the rolls that which was done by the will of the king and not according to the ordinary course of justice, by such phrases as "per preceptum domini Regis" or "de consilio Regis".[1] This appears in connection with a record of an inquisition in 1199,—"et notandum quod hec inquisicio facta fuit per preceptum domini Regis non per considerationem curie vel secundum consuetudinem regni".[2] In 10 John, a case is recorded in which Earl Segerus sought the advowson of a church by writ of right against Robert de Insula, who denied the right and placed himself on the grand assise. The case, however, is postponed indefinitely as "Dominus Rex non vult quod loquela illa procedat".[3]

On the other hand, clearly equitable is the case in 11 John, in which the king,—"motus misericordia et per consilium recipit oblationem ipsius Hawisie" and allowed the grand assise to proceed, because her husband, bribed by the plaintiff's gifts, was conniving at the loss of his wife's property by refusing to appear.[4] Again, the king stepped in to warrant defaults by his writ "de servitio regis"; sometimes in favor of the plaintiff in suits where by judgment of the court the defendant had gone "sine die"; thus causing the case to be recalled.[5] The law as to defaults and essoins was very involved. Bracton speaks of a contention among the justices as to whether the tenant making default after the election of the four knights to choose the grand assise should lose his land for all time, and thinks that he should have some chance of recovery; citing for this opinion the case of Fray Punchard in 16 Henry III., where the defaulting tenant is to have "tale recuperare quale habere debeat".[6] But whether the

[1] Cf. Bracton, f. 367,—"Et [si justiciariis suis necessitatem imponat rex] quod judicium reddant in hoc casu vel consimilibus, ita reddant juditium quod non pro juditio, sed quia dominus rex ita vult, et inde sequitur quod juditium potius voluntarium sit quam justum, si dici debeat juditium."

[2] Rot. Cur. Reg., II, p. 189. See also Bracton's Note Book, No. 894: "Postea, per preceptum Domini Regis consideratum est quod episcopus recuperavit seisinam suam, etc., salvo jure cuiuslibet."

[3] Placit. Abbrev., p. 60. (Cantebrigia.)

[4] Placit. Abbrev., p. 66. In after times, at any rate, the judges had the power to allow the wife to plead without her husband in such a case as this of their own authority.

[5] Bracton's Note Book, Nos. 397, 940, 1626.

[6] Bracton, f. 367; Bracton's Note Book, No. 688.

default was made by the plaintiff or by the tenant, it is clear that the king could by his warrant cause the case to be recalled, so that it proceeded as if no default had been made.[1] An example is the case of Paul de Winchelsea, who was plaintiff and made default after four knights had been summoned to choose the twelve for the grand assise, and, therefore, judgment was given that the tenants should go "sine die" and Paul "in misericordia". "Post venit Paulinus et saluata est ei defalta per Dom. Regem et per Dom. Cancellarium eo quod tunc fuit in seruicio Dom. Regis, et ideo summoneatur loquela".[2] The judgment "sine die" would not, it would seem, have prevented the plaintiff from obtaining a new writ and beginning the case afresh, although a writ of prohibition against proceeding further in the local court had been sued out by the tenant after placing himself upon the grand assise;[3] therefore an essoin would not have been allowed to him as easily as to the tenant,[4] and the case must be looked upon as an equitable exercise of the king's prerogative.[5]

The attempt has been made in this chapter to show how important a role the kings, down to Edward I., played in the administration of justice. It is hard to see any reason why the greater part of this jurisdiction left to the king could not as well have been exercised by the courts; but the fact remains that it was not, and that the justices and lawyers are at one in support of this prerogative. It must be borne in mind, that during this time the

[1] Bracton, f. 368 b.-369 b. In f. 369, Bracton says that if the king order the justices to allow an essoin of the king's service when they know it cannot be true as the defaulter has been seen in court, they should do it making clear in their judgment that it is done by the king's will. (supra, p. 27, note 1).

[2] (14 Hen. III.), Bracton's Note Book, No. 397. Cited by Bracton, f. 369 b. Bracton says that the Chancellor, Ralph, Bishop of Chichester, was sitting in court.

[3] Bigelow, Procedure, p. 271.

[4] As to the allowing of such an essoin to the plaintiff if the king did not interfere see Bigelow, Procedure, 270, 271. But the question was a difficult one and in 1201 a case is postponed to consult the king as to how to proceed. (Select Civil Pleas, No. 87; see supra, p. 19.) Such questions were still troubling the lawyers in the time of Edw. I. Y. B. 20-21 Edw. I., p. 159, 32-33 Edw. I, p. 453.

[5] It may be noted in passing, that the lord of the manor exercised an equitable jurisdiction in his court like that of the king just described. See letter in Maitland's introduction to the pleas of the manor of Brightwaltham (Select Pleas in Manorial Courts, p. 163).

common law was in its great period of development; and though by the end of the reign of Edward I. we cannot speak of a rigid case law, like that of later times, still the common law had received its form and was no longer capable of taking over that large additional jurisdiction which the king had exercised. The kings of England, from the time of Edward III., preferred the military to the judicial role, and delegated more and more of their law work to others.[1] An ambitious parliament obtained the larger share in legislation; to council, parliament, and chancery went the greater part of the equitable jurisdiction. Of these the chancellor's court was destined from its nature and composition to become the great court of equity. The reference to the chancellor of petitions in parliament is already to be noted in the time of Edward I.[2] The end of the period of growth meant also the beginning of a period of decay for the common law, partly to be connected with the fact that the king no longer took an active part in its administration. This decay helped the growth of the chancery and the other so-called equity courts; the court of Requests, the Star Chamber, the Council of the North and others. The pardoning power remained vested in the sovereign and is today exercised through the Home Secretary.[3]

[1] Cf. Hardy, Introduction to the Close Rolls, p. xxvii.

[2] See infra, over chancellor and chancery, pp. 56-57.

[3] Cf. Pollock and Maitland, I., p. 17. Stubbs, Const. Hist., II., pp. 281—282, Gneist, Verf. Gesch., p. 334, Kerly, Chap. III, Spence, Pt. II., Chap. I., Hardy, Introduction to the Close Rolls, p. xxiii. ff.

CHAPTER III.

EQUITY IN CURIA REGIS BEFORE THE TIME OF GLANVILL.

The history of an equitable jurisdiction before the time of Glanvill and the beginning of the plea rolls may be passed over in all haste, as little more than a commentary on the last chapter, the equity that lay in the king. The king's court appears to have been a tribunal for great men and great causes, not bound down to the old English law prevailing in the local courts, but exercising exclusively an equitable, that is to say an extraordinary, jurisdiction.[1] This jurisdiction cannot be supposed to have reached very far, for it is the reforms of Henry II. that first bring the king's justice within reach of every free man; but such as it was in the days of Henry I., it seems to have been a much sought-for jurisdiction. The justice of the king's court may be called equitable in that it was a better article than was to be obtained elsewhere.[2]

But the sources by which this jurisdiction might be followed in detail almost entirely fail. There are no plea rolls; to fill their place there are only the records of pleas contained in chartularies and chronicles, which do not pretend to give the cases with exactness. The earliest pipe roll now extant is from the thirty-first year of Henry I., followed, for us, by that of the second year of Henry II., with which an almost continuous series reaching down to the present century begins. For contemporaneous law books, one must look to those attempts to write down the law administered in the local courts, as derived from the Anglo-Saxon laws of the time of Canute or Edward the

[1] Cf. Pollock and Maitland, I., pp. 85-86, Stubbs, Const. Hist., I., p. 421.

[2] Cf. Pollock and Maitland, I., pp. 138—139.

Confessor.[1] Just at the end of this period appears the Dialogus de Scaccario by Richard Fitz Neal, the Treasurer and a contemporary of Glanvill, which, in professing to give the details of the administration of the exchequer, throws light, at the same time, on the workings of the king's court and on the whole administration of the kingdom.[2]

The exchequer is the only regular and permanent form in which the king's court appears during this period. For the most part, it is an administrative bureau attending to the king's revenues; but it is also a judicial tribunal.[3] From its records, the early pipe rolls, and from the Dialogue we can obtain an idea as to the status of the king's justice in this period.

The author of the Dialogue claims that in the exchequer justice is tempered by equity.[4] The duty of its members is to care for the king's interests, "salva tamen aequitate."[5] Equity, he points out as one instance, should be exercised towards those who are unable to pay.[6] How far such an equity is really present the pipe rolls will show.

The pipe rolls give evidence to much that can be called extraordinary in the exercise of jurisdiction by the king's court. Privileges for which money is paid are regularly recorded; among which those that are morally equitable are not to be easily distinguished from those which are arbitrary or merely granted for money. One rule, however,—and this verifies the statement of the Dialogue,—a rule which is distinctly equitable, is brought to light by the earliest pipe roll, and remains in force throughout the whole period of which I am treating; namely, that the fine shall be in part or wholly remitted in cases of poverty.[7] This

[1] There are a number of these attempts,—Quadripartitus, Leges Henrici Primi, Leges Edwardi Confessoris, Consiliatio Cnuti, and others which Prof. Liebermann has been restoring to their proper place and importance.

[2] Cf. Liebermann, Einleitung in den Dialogus de Scaccario. Pollock and Maitland, I., pp. 140-141.

[3] Liebermann, Einleitung, p. 79. Pollock and Maitland, I., p. 87.

[4] Cf. Liebermann, Einleitung, p. 61.

[5] Dialogus I., cap. 3 and 4. Stubbs, Charters, pp. 172, 176.

[6] Ibid. II., c. XIV. Stubbs, Charters, p. 226.

[7] Pipe Roll, 31 Henry I., p. 73 et passim. For examples in later times see Placit. Abbrev., passim. Cf. Dialogus, II., c. 23, "nisi rex ipse obsequii praestiti vel paupertatis intuitu aliquid sibi praeter communem legem indulgeat." Stubbs, Charters, p. 242. The rule also applied to the jurisdiction in Manorial courts. Select Pleas in Manorial Courts, pp. 42, 52, 93, etc.

is explainable in part in that justice did not know what to do with the man owing a fine but not meriting a judgment of corporal punishment, as imprisonment as a punishment was little known. The prison was looked upon as a place of detainment for those waiting to be tried or to make fine for their fault. Thus in 43 Henry III., by judgment of the court, "Johannes commitatur gaiole, etc. pauper est."[1] There is nothing to be gained by imprisoning him; therefore he is pardoned. Poverty was also, at any rate in later times, a ground for allowing certain equitable privileges. Thus Christiana, in Henry III.'s reign, is not obliged to find pledges to prosecute "quia pauper".[2] Similar to this is the rule, for which, in truth, the evidence also comes from a later time, that those under age should be treated more mildly. The misericordia is pardoned "quia infra etatem".[3]

But, apart from such general rules, it will be well to note some of the privileges for which money was paid, to obtain an idea of the morality of the king's justice before the reforms of Henry II. instituted a regular procedure in the king's court.[4] Payment was made to gain the king's protection,[5] to hasten judgment,[6] to have a pending case postponed, generally until the king returned that the case might be tried before him,[7] that the payer should not be impleaded as to his lands,[8] that his lord should not dispose of his services except by his own consent,[9] that he should be allowed to purge himself by oath instead of by the ordeal of fire,[10] that the judicial duel should not take place,[11] that outlaws should not be mutilated,[12] that he should

[1] Placit. Abbrev., p. 146. (Berk').
[2] Ibid. p. 185. Cf. Bracton, f. 337 b.
[3] Ibid. pp. 121, 149. Cf. Bracton's Note Book, No. 1958. Y. B. 33-35 Edw. I., p. 471. See also Select Pleas of the Crown, No. 190.—"et ideo eat quietus quia senex est." Pollock and Maitland, II., pp. 438-440.
[4] Cf. Madox, History of the Exchequer, Chap. XII.
[5] Pipe Roll, 31 Henry I., p. 84.
[6] Examples from pipe rolls of Henry II., Madox. p. 308.
[7] Pipe Roll, 31 Henry I., pp. 18, 24, 26. 2, 3, & 4 Henry II., pp. 86, 120.
[8] Pipe Roll, 31 Hen. I., pp. 14, 29, 40, 64, 86, 154, 157. Cf. Placit. Abbrev., p. 97 where the king makes known by his writ that W. has made fine with him that he should not be impleaded for his land.
[8] Pipe Roll, 31 Hen. I., p. 62.
[10] Ibid. p. 35. Cf. Madox, p. 143,—"R. filius B. reddit compotum de XX. L. pro quientia judicii ferri." Bigelow, Placita Anglo-Normannica, p. 275.
[11] Pipe Roll, 31 Hen. I., p. 42, Cf. Ibid. p. 55.
[12] Ibid. p. 37.

be justly handled in the court of his lord,[1] that the king should act as mediator in his plea against a powerful noble,[2] that he should have a right judgment concerning a certain church,[3] that R. should hold the agreement that he made with his men,[4] that an inquiry in the nature of an inquisition should be granted,[5] that he should have his debt,[6] that his manor should be taxed in the future as six hides,[7] that he should be reseised of his lands[8], that he should be allowed to go out of captivity,[9] that he should be inlawed.[10]

The remission of the fine is granted "pro amore" or "petitione" of an influential noble.[11] That the barons apart from the king could exercise a discretion in the commutation of payment, is shown by a record in 31 Henry I., where the sheriffs are "in perdonis per considerationem Baronum de Scaccario."[12]

If to these examples of privileges beyond the law for which money was paid the amounts paid were also taken into account, it would leave no doubt as to the arbitrariness of the justice of the king's court. From this list a few equitable principles can be deduced. For example, the king will protect the weak against the powerful, will interfere if justice cannot be obtained in the lord's court, that principle which later will become so fruitful; but all these privileges appear to be arbitrary, to be obtained if one had money enough to pay for them. There is nothing regular in the assessment of the fines; their amounts were fixed in proportion to the man's ability to pay. The Jews of London have to pay two thousand pounds for killing a sick man,[13] Nigel of Doncaster makes fine with twenty marks silver for his sons who had killed a man.[14]

In regard to crown pleas, when the accused was tried and found guilty at the suit of the king the punishment was, gene-

[1] Pipe Roll, 31 Hen. I., pp. 85, 143.
[2] Ibid. pp. 67, 114, 124, 148.
[3] Ibid. p. 146.
[4] Ibid. p. 68.
[5] Ibid. p. 136.
[6] Ibid. p. 146.
[7] Ibid. pp. 123, 125.
[8] Ibid. p. 87.
[9] Ibid. pp. 39, 43.
[10] Ibid. p. 102, 2, 3, & 4 Henry II., pp. 53, 66.
[11] Pipe Roll, 31 Hen. I., pp. 61, 71. 97. 2. 3 & 4 Henry II., p. 130.
[12] Pipe Roll, 31 Hen. I., p. 96.
[13] Ibid. p. 149.
[14] Ibid p. 32.

rally, much milder than when a personal appeal for the same offence had been successful. The judges had the power to inflict the full penalty, of this there can be no doubt; but it was to the interest of the the king's treasury if a fine instead of a penalty of life or members was inflicted.[1] In two cases above cited, fines are accepted for homicide. But take as example the case of rape. This Bracton says was formerly punished by hanging[2], but a case occurs in the pipe rolls where it is commuted for seven marks.[3] For his own time, Bracton gives the punishment as blinding and castration unless the woman wish to take the ravisher as her husband.[4] Yet the plea rolls show the judges generally quashing the woman's appeal on the ground of some technicality, and then, when the accused was arraigned at the suit of the king, and found guilty, he, as a rule, escaped with a fine.[5]

The conclusion to be drawn from such an investigation of the pipe rolls must be that the king's justice was mainly exercised for the money it brought in to the royal treasury.[6] That this could be so, and still the king's justice not be entirely incompatible with the demands of "natural equity", is due to the low state of ordinary justice. "He sold justice but it was a better article than was to be had elsewhere."[7] In John's time

[1] See Leges Henrici Primi, Chap. XIII., where a list of some of the heaviest crimes is given and the penalty set is to be in mercy of the king.

[2] Bracton, f. 147. There is no necessary contradiction in this to the Leges Henrici, Chap. XIII., § 6, which evidently refers only to a trial at the suit of the king. By this the guilty man is to be in the king's mercy.

[3] Pipe Roll, 31 Hen. I., p. 90.

[4] f. 147. Cf. Select Pleas of the Crown, No. 7.

[5] Northumberland Assise Rolls, pp. 93-94, 113, ("finem fecit per dimidiam marcam") 316. Also Placit. Abbrev., p. 253. In the early part of the reign of Henry II., Henry of Essex is accused of rape, but objects to being tried in any but his own court on the ground that the girl was born in his demesne. This is allowed, although from the very first appearance of crown pleas rape is among them. See Placita Anglo-Normannica, p. 247. As to rape, cf. Pollock and Maitland, II., pp. 488-490, Henderson, Verbrechen u. Strafen in England, p. 30 (Berlin, 1890).

[6] Cf. Bigelow, Procedure, pp. 187, 189—190. Stubbs, Const. Hist., I., p. 418, Gneist, Verf. Gesch., 137, 170. Liebermann, Einleitung in den Dialogus de Scaccario, p. 36. See the famous case of Richard of Anesty (Placita Anglo-Normannica, pp. 311-314) as to how costly and slow the king's justice might be even in the time of Henry II. Cf. Pollock and Maitland, I., pp. 137-138.

[7] Pollock and Maitland, I., p. 138.

this excuse no longer existed, the common law provided an equitable remedy for almost all wrongs, and he is forced to promise that he will sell justice to none.[1] Whether, in the time before Glanvill, it was only justice that he sold, whether unjust privileges were not also to be had for money, is to my mind questionable. The payments for the delay of judgment and the payments to prevent being impleaded, which occur so often, certainly do not appear to be in the interests of justice. Professor Liebermann has pointed out the inconsistency, when Richard Fitz Neal defends the king's court against the charge of selling justice and claims only the hastening of the case can be bought, yet, later on, states that the king only allows his jurisdiction to a few without payment and often, in spite of large offers, refuses to hear a claim made by a person out of favor, or one which is directed against a favorite.[2] Offices demand heavy prices,[3] men pay to sit as judges[4] or to be exempted from judicial work,[5] the recorded pleas often attest the use of money;[6] and where money played so large a part it cannot be supposed that a strict line was drawn between justice and injustice.

Turning to such pleas as have come down to us through chartularies and chronicles, the picture of the king's justice is brighter than that given by the pipe rolls which necessarily emphasize the money side. They show a transition period and the law in a state of development.[7] The word "aequitas" appears often;[8] the recorders, exclusively ecclesiastics, were familiar with the Roman conception of equity; but beyond stating it as an understood principle that equity should always be present to temper justice, they give us no rules for its application.

These pleas leave no doubt that the king's court gave

[1] Magna Carta, Cap. 40.

[2] Einleitung in den Dialogus de Scaccario, p. 60.

[3] The chancellor paid £ 3006, 13 s. 4 d. for the custody of the seal. Pipe Roll, 31 Henry I., p. 140. Richard Fitz Neal had to pay an enormous sum for the treasurership. Liebermann, Einleit., pp. 35-36.

[4] Pipe Roll, 31 Henry I., p. 101. "R. filius A. debet XV. marcos ut sederet cum Radulpho basset ad placita Regis."

[5] Pipe Roll, 31 Henry I., p. 34. "Judices et Juratores Eborascir debent C libras ut n' amplius sint judices nec juratores."

[6] Placita Anglo-Normannica, pp. 133, 207-208. 230, 231, 284. But, in general, the recorders are interested in suppressing such details, as they record chiefly the pleas in which their monasteries were engaged.

[7] Cf. Bigelow, Introd. to Placita Anglo-Normannica, p. xii.

[8] Placita Anglo-Normannica, pp. 84, 85, 157, 177, 196, 200.

remedies that were morally equitable, but one cannot speak of an "equity" as opposed to a "rigor juris" as no fixed law existed in the king's court in this time.[1]

[1] Bigelow, Introduction to Plac. Angl.-Norm., pp. xxxii-xxxiii. Bigelow, Procedure, p. 111. For cases illustrating the looseness of procedure in the king's court see especially Plac. Angl.-Norm., pp. 67, 198-203, 221-222, 238-240 and Hoveden, II., p. 286.

CHAPTER IV.

THE EQUITY OF THE KING'S COURT IN THE TIME OF GLANVILL AND BRACTON.

With Glanvill the chief part of this essay begins. Before his time all of the king's justice had been extraordinary; his treatise first bears witness to a law on which as a basis the justice of the king's courts shall rest. Here first, then, is it possible to speak of a "*rigor juris*" and of an equity in distinction to the "*rigor juris*." He also gives a clue by which some of the cases in which the justices go beyond the strict letter of the law to decide the case, or to grant a privilege according to the dictates of equity, may be distinguished.

Glanvill uses the term "*acquitas*" frequently and in a very loose sense. In his preface, in imitation of Justinian's Institutes,[1] he lauds the king for his justice toward the insolent and violent and his equity to the humble and obedient,[2] and for his justice, discretion, and mercy in the regulation of his court with such a strict regard for equity,[3] that none of his justices dares to deviate from the path of justice, the poor are protected and no favor is shown. He praises his virtue in choosing men who are the wisest and most learned in law to be his judges, who, in determining cases, as far as consistent with reason, act now with severity now with leniency according to their discretion.[4] In the second book, he speaks of the grand assise as an institution derived from equity.[5] To such a use of the word equity

[1] See Phillips, Englische Reichs- und Rechtsgeschichte, I., p. 237.

[2] Prologus,—"et humilium et mansuetorum equitatis virga moderando justitiam."

[3] Prologus,—"cum tante equitatis sit sue celsitudinis curia."

[4] Prologus,—"et ad causas mediante justitia decidendas, et lites derimendas nunc severius nunc mitius agendo prout viderint expedite ipsis verum argumentis comperit cum ratione promptissimos."

[5] Lib. II., c. 7.

may be compared Bracton's definition,[1] which he has taken directly from the Summa Azonis, and the frequent passages in which he states that the law in the special case under discussion is founded on principles of equity, or "natural equity" as he often expresses it. "Et sufficit quod hoc semel voluit quia nihil tam conveniens est ***naturali aequitati***, quam voluntatem domini, volentis rem suam in alium transferre, ratum haberi."[2]

But in all this, Glanvill and Bracton are but giving it as their opinion that the law of their day was founded on equitable principles and that the judges were not so bound down to the letter of the law as to defeat the ends of justice in cases where its strict application would cause hardship. On the other hand, from the repetition of a certain phrase it can be deduced that the justices made use of a special procedure for deciding such cases, and this procedure was a consultation of the court,—*de consilio curiae*[3] This phrase often occurs in both Glanvill and Bracton and always points to an exercise of discretion on the part of the justices. A few times it is used in connection with the word equity and these cases are worth noticing.

[Glanvill, VII. c. 1.] "Si ergo remanet placitum inter patrem et primogenitum filium, sed procedit inter primogenitum filium et postnatum predicto modo, aliquando tamen super hoc ultimo casu in curia domini Regis *de consilio curiae ita ex aequitate* consideratum est, quod terra sic donata filio primogenito remaneat." etc.

[Glanvill, II. c. 12.] "Ad haec autem talia expedienda plus profuit sequi *curiae consilium* quam juris cursum consultum servare, unde providentie et arbitrio domini Regis vel ejus justiciis rem istam utilius et *aequius* temperare."

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fieri debeat, *per consilium curiae sive per judicis officium*, quod idem est, quod remanere debeat seysina rei disseysitae cum vero domino, et non cum feoffato per disseysitorem."

These examples are all in reference to special cases. There is only one reference that I have found in which either Glanvill or Bracton mention the "*consilium curiae*" as a regular mode of procedure for extraordinary cases. Bracton, in a paragraph at the beginning of his book, says that the law as made by king and council cannot be changed by the justices. But they may add to it if occasion arises. When new and unaccustomed cases arise, if precedents in other cases are to be found they should be decided accordingly; but if unprecedented cases arise let them be decided by a consultation of the court.

[Bracton, f. 1 b.] "Si autem talia nunquam prius evenerint, et obscurum et difficile sit eorum judicium, tunc ponantur judicium in respectu usque ad magnam curiam, ut ibi *per consilium curiae* terminentur."

Before turning to the rolls, further examples of the use of this phrase may be cited from both Glanvill and Bracton.

[Glanvill, III. c. 2.] A man called to warranty shall, at the petition of the tenant, "*de consilio et beneficio curiae*,"[1] be summoned by a judicial writ.

[Glanvill, X. c. 8.] In what manner a debtor should be distrained to appear may be left to the discretion of the court *(consilio curiae)*, that the case may be properly expedited.

[Glanvill, XIII. c. 2.] An inquisition as to a side issue shall, with the consent of the parties, "*de consilio curiae*," be granted.

[Bracton, f. 203.] The assise of novel disseisin may be allowed to a woman, "*de consilio curiae*," if she was maliciously ejected while her husband was on a long journey. "Et excipiatur quod sine viro petere non possit, excipiatur contra disseysitores fraude et dolo."[2]

[Bracton, f. 247 b.] The law is stated as to the manner in which the defendant, who is maliciously delaying that the time should expire, should be distrained. For this law Bracton cites a judgment from the eyre of William Raleigh,—"et hoc provenit *non per judicium sed per consilium curiae* ad malitiam

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eorum reprimendam qui praesentationes malitiose impediunt ut tempus currat."

[Bracton, f. 340, f. 345 b.] These are cases in which essoins are allowed "*de consilio*" and not "*de jure.*" In the matter of essoins Bracton gives the judges a wide discretion.[1]

[Bracton, f. 272 b.] If, in an assise of mord-ancester, it can be proved that such a one was born in a county where the king's writ does not run, the justices, "*de consilio curiae,*" should send to that county to inquire the truth of the matter.

[Bracton, f. 316.] Bracton's law as to what should be done in the case of a woman who has committed waste is based on a case which he cites from 9 Henry III., in which "*de consilio curiae* propter vastum appositus fuit forestarius."

A search of the printed plea rolls of the thirteenth century, together with those of Richard's reign in the last part of the twelfth century, has resulted in the collection of some fifteen cases in which the judges acting "*de consilio curiae*" go beyond the "*rigor juris.*" These admit of but little classification as almost every case illustrates a new point. This, indeed, would be expected for, though no rigid case law obtained in this time, the judgment that the judges gave after such a consultation must have acted as a precedent[2] and the next case arising under the same head would no longer be decided "*de consilio.*" I shall proceed to discuss very briefly the point on which the judges use their discretion in these cases.

Under the head of applying extraordinary means of distraint to bring a defaulting defendant into court fall the following cases:—

Bracton's Note Book, *No.* 2, in Appendix, vol. III., p. 717. Plea of Debt, in Bench, Michaelmas, 3—4 Henry III.

The sheriff sends word that he has made distraint and that the defendants abduct themselves. Therefore, "*per consilium curie*", the sheriff is ordered to take all their lands and chattels into the hands of the king so that they cannot lay hands on them and summon them to appear on a certain day.

Ibid. No. 900. Plea of Debt in Bench, Michaelmas, 8—9 Henry III.

The defendant has been distrained as far as taking land and chattels and still makes default. Therefore, "*per consilium*

[1] Bracton, f. 339,—"Ad minus habebunt essoniati tantum tempus et ex causa majus tempus, secundum discretionem justitiarii."

[2] At least so Bracton would argue, and he was a royal judge. See f. 1 b.

curie", the sheriff is ordered to bring the profits of such lands and chattels into court to pay the plaintiff.[1]

Ibid. No. 785. Plea of "Quare Impedit", brought by the king in Bench, Michaelmas, 17—18 Henry III.

The defendant made default. Because the time is short and because the church remains vacant, "*de consilio curiae*", he is to be distrained by land and chattels to appear on a certain day.[2]

Ibid. No. 1376. Plea of Warranty in Bench, Trinity, 4 Henry III.

Because the defendant making default is a Jew and holds no land in fee, "*per consilium curiae*", the sheriff is commanded to have his body in court.

Under the same head and the matter of allowing essoins fall:—

Three Rolls of King's Court, p. 29. Plea of Dower, 6 Richard I.

The defendant essoins himself [de malo lecti][3]; but it does not seem to the court that languor should be allowed in a case of dower as the woman has nothing of her dower. Therefore, "*per consili[um curie]*", his lands are to be taken into the hands of the king.

Bracton's Note Book, *No. 1613.* Plea of Warranty, in Bench, Easter, 7 Henry III.

The essoin of the defendant for another case is, "*per consilium curie*", allowed for this as well.[4]

Third parties are summoned at the discretion of the court:—

Bracton's Note Book, *No. 273.* A plea for services, in Bench, Hilary and Easter, 12 Henry III.

The defendant acknowledges that he holds of the plaintiff and owes these services, but says that two others hold the tenement and he is not able to distrain them. "*Per consilium curie*", they are summoned to appear and show by what warrant they hold this tenement.

Bracton's Note Book, *No. 748.* Plea of Dower, in Bench, Hilary, 17 Henry III.

[1] Cf. Bracton, f. 440 b.

[2] The day given is a month from Michaelmas and it is now the octave (see Maitland's footnote to case). No doubt the fact that the king brings the plea is the reason for this extraordinary procedure. Cf. Bracton, f. 387, where case is cited.

[3] A supposition as there is a break in the manuscript.

[4] Cf. Bracton, f. 346.

The defendants call Isabella, daughter and heir of John who had sold them the land, to warranty, on the ground of a charter by which John and his heirs are bound to warranty, and if unable to warrant they are to make full exchange to the defendants of a messuage which John then held in London, and whoever should hold this should warrant the defendants. Isabella is four years old and, therefore, unable to warrant. "*De consilio curie*", the tenant of the messuage in London is summoned to answer to the defendants by what warrant and through whom he has entry in the said messuage.[1]

We come now to cases which bear no classification.

Bracton's Note Book, *No. 113*. Plea of Right, in Bench, Hilary and Easter, 4 Henry III.

"Concerning an attorney made by the testimony of four knights, if he comes and the knights do not, let him be admitted, "*de consilio curie*" and let the knights be attached; but if the tenant places himself on the grand assise let the case be postponed until the knights have borne witness."[2]

Bracton's Note Book, *No. 786*. A plea for damages, in Bench, Michaelmas, 17—18 Henry III.

After it had been adjudged that the defendant should wage his law twelve-handed, at the defendant's suit, "*per consilium justic*'", the facts are to be determined by an inquisition.

Bracton's Note Book, *No. 534*. Plea of Right, in Bench, Easter, 15 Henry III.

The warrantor called by the defendant in a suit for two acres of land enters into warranty. The plaintiff now proceeds against the warrantor for four acres and the warrantor seeks a view. The view does not lie by strict law for the two acres which he has warranted, but, "*de consilio curie*", the view is granted for all four in order that the plea may proceed in regard to the whole.

Bracton's Note Book, *No. 556*. Plea of Right, in Bench, Easter, 15 Henry III.

A sheriff is plaintiff and has failed to send the "pone" by which the Bench has cognizance of the case. "*De consilio curie*", he is summoned to bring the "pone" on a certain day and then to hear his judgment for not having sent it. Evidently

[1] Cf. Bracton, f. 382, where this case is cited.

[2] I translate here, somewhat loosely for the sake of greater clearness, the marginal note to the case, written presumably by Bracton.

the sheriff is attempting to retain the case for his own court by not sending the "pone", and it is to prevent this injustice to the defendants that the judges act before they have cognizance.

Placit. Abbrev., *p. 182*. Plea of Darrein Presentment, Coram Rege, 56 Henry III.

The question settled here is one of procedure in an unprecedented case[1]. A guardian brings the plea for an heir under age and seeks the assise. The defendant claims that the heir is not entitled to the assise and seeks judgment according to a fine, which the plaintiff says is false. The assise is not allowed; but, "*de consilio curie*", the feet of fines are to be searched for the foot of this particular fine. This is not found and judgment is given for the plaintiff. The mercy fine is pardoned the defendant by the king.

Bracton's Note Book, *No. 1503*. In Bench, Hilary and Easter, 5 Henry III.

Peter complains that Muriel, his dead brother's wife makes herself out to be pregnant to defraud him of the inheritance. A recognition thinks she is pregnant and the case goes without day. It is taken up again at Peter's suit because of the length of time that had elapsed without delivery. "*Per consilium curie*", she is placed in the custody of the mayor of London, and four legal women are assigned to make frequent inquisitions.

I do not think any distinction can be made between the two phrases "*de consilio curiae*" and "*de gratia curiae*". The orders of an extraordinary nature made in connection with them are, whichever phrase is used to express it, orders "*per judicis officium*". Thus Bracton would allow the justices "*de gratia*" to support a writ which by strict law should fall, if there is sufficient reason for doing so; and for this cites a case from Easter, 14 Henry III.[2] Again, a view may be allowed after default "*ex abundanti*", citing for this a case from Trinity, 4 Henry III.[3] The following cases may be cited as further illustrations.

Bracton's Note Book, *No. 117*. Plea of Right, in Bench, Hilary and Easter, 4 Henry III.

The plaintiff recovers seisin by judgment because the

[1] Bracton, f. 1 b.:—Unprecedented cases are to be decided "per consilium curiae"; see supra, p. 39.

[2] Ibid. f. 320. "de gratia justic'."

[3] Ibid. f. 377. b.

tenant does not produce his warrantors; nevertheless, "*ex gracia curie*" the warrantors are summoned to appear and warrant on a certain day.[1] Judgment has been given where nothing as to the right has been tried. If the warrantors enter into warranty the case is evidently to be re-opened.

Year Books, 20—21 Edward I., p. 415.

Note: That the justices in eyre can "*de gratia*" grant an attaint on petition without a writ.

Year Books, 30—31 Edward I., p. 169. Plea of Formedon, Cornish Iter (30 Edw. I.).

A writ of Praecipe runs against two defendants, one of whom makes default, but the other appears and claims to hold alone both the tenements in question; and "*de grace*" he is allowed to answer for all.

A case where the word "*discretio*" is used in the same manner as we have seen "*consilium*" and "*gratia*" used, should be added.

Placit. Abbrev., p. 230. Plea of Novel Disseisin, Hilary, 21 Edward I.

The jurors say that Robert did disseise Adam, therefore judgment is given for Adam. A day is set for the jurors in a special verdict, "prout discretionem justic[iariorum]".[2]

The number of these cases is small if we take into consideration the number of rolls examined. The unprinted rolls would doubtless yield many more. The chief reason for this paucity lies in the unwillingness of the judges to handle difficult suits calling for extraordinary remedies.[3] When such arose they, as a rule, preferred to refer them to the king in council[4], or to bring the parties to a compromise. There can be no doubt that many of these concords, which occur so often on the rolls, stand in the place of an exercise of equity and, as they are often brought about at the will of the justices, they tend to hinder the development of the common law in an equitable direction. A few examples will suffice to illustrate this.

In the case of the Abbot of Battle v. Alan de Bellafago,

[1] Cf. the marginal note to this case presumably written by Bracton.

[2] "Jur' in speciali veredicto prout discretionem justic', dies datus". This would seem to refer to an attaint. Bracton's Note Book, No. 713, deserves also to be mentioned as a case in which the judges order or advise an equitable restitution.

[3] Cf. Pollock and Maitland, II., pp. 667-668.

[4] See infra, pp. 48-50.

as to the right of presentation to a church in the time of Henry II., the whole court are of the opinion that the matter should be settled by agreement rather than by litigation, and, thus persuaded, the parties make a compromise.[1]

In a plea of Mordancester, of Michaelis, 6 Richard I., the defendant produces a charter of gift from the father of the plaintiff. But because there was a "*lis et contentio*" among the justices as to whether this charter ought to hold against an infant under age so that he should not have the seisin of his father, "*consilio justic*'" an agreement is made between the parties until the infant should come of age.[2]

In a plea of mordancester, from the Cornish iter of 1201, the defendants plead that the ancestor, the uncle of the plaintiff, was the son of a deacon and therefore a bastard, so that the plaintiff cannot be his heir. The plaintiff aknowledges the fact. A day is given in Bench not to hear his judgment which is clear, but to have the counsel of the justiciar and, if possible, to bring them to an agreement.[3] The justices evidently look on the judgment as a hard one, but do not feel competent to give an equitable remedy in the face of the law.[4]

In attempting to give a judgment as to the scope of this equity exercised in the king's court, I cannot do better than to quote Pollock and Maitland. "Often on the plea rolls we find it written that some order is made 'by the counsel of the court' (de consilio curiae). It is an order that could not be asked for as a mere matter of strict right; the rigor juris does not dictate it—would perhaps refuse it; but it is made in order that the substantial purposes of the law may be accomplished without circuity of action."[5] To this I can add but little. But to go

[1] Placita Anglo-Normannica, pp. 245-247.

[2] Placit. Abbrev., p. 5.

[3] Select Civil Pleas, No. 205,—"Dies datus est, non ad audiendum iudicium suum, quod patens est, sed pro habendo consilio Justic' et ut possint concordari."

[4] Further examples might be cited from the Year Books. Y. B. 33-35 Edw. I., p. 207:—Brabazon, chief justice of the King's Bench, defines the law in a difficult case by which definition a decision must be given which would cause hardship: "e pur ceo jeo loo qe vous accordez entre vous." Cf. Y. B. 30-31 Edw. I, p. 159; where Berrewik advises a compromise as the most equitable conclusion. The king often persuaded, some times forced, his great vassals to compromise. William of Salisbury vs. Herbert de Burgh, Matt. Paris. Chron. Maj., III., p. 104. Gilbert Marshall vs. Maurice Fitz Gerold. Ibid., IV., 56-57. Cf. Registrum Malmesburiense, II., pp. 338-339.

[5] I., p. 169.

somewhat more into detail, these phrases "*de consilio curiae*" and "*de gratia curiae*" denote an exercise of discretion on the part of the justices 1) in applying extraordinary distraint to force a defendant making default to appear in court,[1] 2) in allowing essoins,[2] 3) in summoning third parties,[3] 4) in granting such procedural advantages as the court had at its disposal; aid view, recognition, attaint,[4] 5) in overriding the rigor of the law to arrive quicker at the right,[5] 6) in granting extraordinary remedies to circumvent fraud and deceit[6], 7) in determining the law in difficult or unprecedented cases.[7]

The Year Books, beginning with the twentieth year of the reign of Edward I., lie beyond the limit set for this research; but they must be brought into consideration for purposes of comparison.

The formality in pleading and procedure to which they bear witness, must give rise to surprise on the part of one who is accustomed to the brief records of the plea rolls before the time of Edward I. Here are already lawyers pleading according to very strict rules and the judges are to be found for the most part closely following the letter of the law. Berrewik, Justice, will say, in 30 Edward I., that the want of a good lawyer causes the party to lose his money.[8] But the justices are still to be seen using their discretion in overriding the ***rigor juris*** in the interest of equity. A lawyer, or the writer of the Year Books, as the case may be, will distinguish here and there between decisions according to the dictates of equity, and those that are more rigorous than equitable.[9]

[1] Gl. X. 8 (supra, p. 39), Br. f. 247 b. (p. 39), N. B. App. No. 2 (p. 40), N. B. No. 900 (p. 40), N. B. No. 785 (p. 41), N. B. No. 1376 (p. 41), Three Rolls of King's Court, Rich. I., p. 29 (p. 41).

[2] Br. f. 340, 345 b. (p. 40), N. B. No. 1613 (p. 41).

[3] N. B. No. 273 (p. 41), N. B. No. 748 (p. 41).

[4] Gl. III. 2. (supra, p. 39), Gl. XIII. 2 (p. 39), Br. f. 272 b. (p. 40), N. B. No. 786 (p. 42), N. B. No. 1503 (p. 43), Br. 377 b. (p. 43), Y. B. 20-21 Edw. I., p. 415 (p. 44), Placit. Abbrev., p. 230 (p. 44).

[5] N. B. No. 113 (p. 42), N. B. No. 534 (p. 42), Br. f. 320 (p. 43), N. B. No. 117 (p. 43), Y. B. 30-31 Edw. I., p. 169 (p. 44).

[6] Br. f. 203 (p. 39), Br. f. 247 b. (p. 39), N. B. No. 556 (p. 42), N. B. No. 1503 (p. 43).

[7] Gl. VII. 1. (p. 38), Gl. II. 12. (p. 38), Br. f. 177 (p. 38), Br. f. 1 b. (p. 39), Br. f. 316 (p. 40), Placit. Abbrev., p. 182 (p. 43).

[8] Y. B. 30-31 Edw. I., p. 173. "Defaute de bon serjant fet B. perde ses deniers." Cf. Malore, Justice, Y. B. 33-35 Edw. I., p. 349-351.

[9] Ibid. 30-31 Edw. I., pp. 119-121 "et hoc plus de rigore quam de equitate." Also 20-21 Edw. I., p. 107, 32-33 Edw. I., p. 513.

The hardship, (*duresse*) which would result to one party or the other through a too strict interpretation of the law, is pleaded by lawyers and allowed by judges as a ground for mitigating it. Trikingham, Justice, in a plea of right, in Bench, Easter, 35 Edward I., gives judgment,—"The record would be necessary to prove that, and we have nothing of the record, nor will we make the suitors come here to record that, for it would be for you a less hardship of law to grant the view."[1] In the matter of quashing writs and allowing assises, it is taken into account whether, if the writ is quashed or the assise disallowed, any remedy at law will remain to the plaintiff.

Hengham, Justice, 34 Edward I., tells a counsel who is pleading to abate the writ, to answer over to the court. "But the cause was because the six months were passed and if this writ were quashed the plaintiff would have no remedy by a possessory writ."[2] Further, we may see the justices using their discretion in admitting a tally as a receipt for debt,[3] contrary to custom;[4] in granting aid where it does not strictly lie in order to arrive quicker at the right;[5] in general, in not allowing fine exceptions which are made to delay the case.[6]

The phrase "*de consilio curiae*" does not occur. But those orders given or judgments rendered by the justices after a consultation[7] among themselves are the equivalent of like orders and judgments entered on the rolls as "by the counsel of the court". An assise is granted to an infant under age by the

[1] Y. B. 33-35 Edw. I., p. 473. Cf. Y. B. 33-35 Edw. I., pp. 579-581, 21-22 Edw. I., pp. 217, 275, 337, 349. Cf. Placit. Abbrev. (Essex'), p. 149. Plea of novel disseisin. The justices decide that the entry made by the defendant did not constitute a disseisin. "Et ideo consideratum est quod breve istud non tenet in casu isto. *Set quia iniquum est,* quod predicta Constantia excluderetur a seisina sua recuperanda per predictum reddicionem quam predictus Henricus fecit predicto Ade, qui nichil habuit in terra illa, consideratum est quod predicta Constancia rehabeat seisinam suam de predicta terra et Adam perquirat sibi per breve mortis antecessoris, si voluerit."

[2] Y. B. 33-35 Edw. I., pp. 193-195. Cf. Ibid. 20-21 Edw. I., p. 427, 32-33 Edw. I, p. 159.

[3] Y. B. 21-22 Edw. I., pp. 457-459.

[4] Y. B. 20-21 Edw. I., p. 305.

[5] Y. B. 33-35 Edw. I., p. 541.

[6] Y. B. 20-21 Edw. I, pp. 29, 409-411.

[7] Y. B. 33-35 Edw. I., pp. 301-303, 417, 559 etc. Also cf. Y. B. 30-31 Edw. I., p. 105-107. Brumpton, Justice, gives judgment that the writ is good; afterwards, however, it is quashed because all the serjeants agree that it is not maintainable in this case.

justices "*en nun de office*";[1] the same as Bracton's phrase "*per judicis officium*". Through such consultations the law and procedure in new or difficult cases is laid down. In a case of "entry on disseisin", in the Bench, Michaelmas, 34 Edward I., the defendant vouched to warranty one out of the degrees. Hunte, counsel for the plaintiff, said that this was contrary to statute and Staunton, Justice, asserted this to be true. Afterwards the justices, Staunton, Hengham and Howard, consulted together and Staunton gave judgment.—"Whatever may be the words of the statute, on account of the hardship which would otherwise ensue the voucher is receivable". Hunte prayed that the reason why it was received and the counterplea should be entered on the roll.[2]

Hitherto the subject has been treated without distinction between the different kinds of king's courts, and this is justified in the main, for each is "*curia regis*" and the same procedure is maintained in all. But, at least from the reign of John we have to reckon with different king's courts. There are the council and court coram rege, which cannot be sharply distinguished from one another, the court of the justices of the Bench, later to become the court of common pleas, and the court of the justices in eyre.[3] "Nothing that was, or could properly be, called an appeal from court to court was known to our common law",[4] but in the nature of appeal were the processes known as attaint, certification, prohibition, transfer by writ of "pone" bearing record, and error, by which cases were transferred from one court to another for trial, or the judgments of one were reconsidered by another.[5] In so far as their difference in competence affects their ability to grant equitable relief, they should be here separately considered.

The king in council was the highest court in the realm; a court of fullest competence in law and equity. A special session of the council, to which prelates and barons and representatives of counties and boroughs were called, formed a parliament.[6]

[1] Y. B. 21-22 Edw. I., p. 449.
[2] Y. B. 33-35 Edw. I., pp. 379-381.
[3] See Pollock and Maitland, I., pp. 148-149, 177-179, for the time and nature of the separation of the "curia regis."
[4] Pollock and Maitland, II., p. 661.
[5] Cf. Ibid, II., pp. 661-667.
[6] That is in the fullest sense; a full meeting of the council was then often designated as a parliament.

The court "coram rege", or king's bench, may be looked upon as "a standing committee of council and parliament." "In modern terms we might say that the court held before the king in parliament and the court held before the king in council are the court of king's bench raised to a higher power".[1]

The king took part in the jurisdiction of his court. There were cases that touched him so nearly that they could not be settled except in his actual presence.[2] And this court must be regarded as the chief court of equity in this period because of the power of the king in council to make the law. The judges of the other courts had power, in a certain degree, to grant equitable remedies, as we have seen, but often they do not feel competent to give a decision and they postpone the cases for the consideration of the king and council.[3] Many cases might be cited from this court where relief is given beyond the dictates of the "*rigor juris*". The king moved by pity and "*per consilium*" grants the grand assise to a woman pleading without her husband, because her husband, bribed by the gifts of the plaintiff, is conniving at the loss of his wife's property by refusing to appear.[4] A judgment is rendered that a man should lose his foot,—"et sciendum quod misericorditer agitur cum eo per consilium domini Regis cum majorem penam de jure demeruisset."[5] Before the king and "*de consilio suo*", it is adjudged that wardship does not pertain to the king on account of a petty serjeantry.[6] The king in council could force even a bishop to wage his law twelve-handed.[7] The exclusive use of the form "*consilium*" in the middle ages does not allow us always to say whether "council" or "counsel" is meant, but "to put *concilium* in the place of *consilium* would be to miss a historical truth of no little importance".[8]

In the court *coram rege* were heard the cases transferred from the other courts by order to bear record or by writ of

[1] Pollock and Maitland, I., p. 178.
[2] Cf. Ibid. I., p. 499. Placit. Abbrev., p. 107: A case before the council, in 25 Henry III., is postponed because the king is not present.
[3] See for example the frequent cases of "Loquendum cum Rege" in the eyre rolls.
[4] Placit. Abbrev. (Staff), p. 66.
[5] Select Pleas of the Crown, No. 192.
[6] Bracton's Note Book, No. 743.
[7] Bracton's Note Book, No. 741. Cf. Placit. Abbrev., pp. 66, 80
[8] Maitland, Introduction to Memoranda de Parliamento, 1305, p. xci.

error.[1] Certain great vassals and religious houses had the privilege that their cases should be tried only before the king. Nor does it seem to have been difficult to get a case transferred.[2] The king would order it because he wished the plea brought quickly to a decision,[3] or because the plea especially interested him.[4] In 21 Henry III., an abbot gives the king one palfrey to have his case transferred from the bench before the king and council for judgment.[5] If an error is found in the proceedings of another court the justices of that court are fined.[6] In 26 Edward I., an error in the Bench is to be retried by the Bench, as, by the Great Charter, common pleas ought not to follow the king's bench;[7] but this rule had not prevented the king's bench from taking cognizance of common pleas in earlier times.

The bench at Westminster, the later court of common pleas, seems to have been almost omnicompetent.[8] It took cognizance, at this time, of crown as well as civil pleas; only such cases as touched the king's interests closely could not be settled there. It could review the procedure of the justices in eyre and of the county courts.[9] As to its power to give equitable relief, the greater number of the cases "*de consilio curiae*", and of the equitable cases cited from the Year Books, come from the bench, which means that the justices of the bench could grant privileges and give relief beyond the letter of the law.[10]

A general eyre was the king's court carried into the counties.

[1] See for examples, Placit. Abbrev., pp. 112, 182, 184, 185, etc.

[2] Bracton, f. 331. "Poterit tamen utraque coram eis de gratia terminari si voluerint etiam sine pone."

[3] Placit. Abbrev., p. 182.

[4] Cf. Bracton's Note Book, No. 12: The case is decided by the council because the defendants claim that they cannot answer because of the king's prerogative.

[5] Bracton's Note Book, No. 1189. Cf. Placit. Abbrev. (War'), p. 75.

[6] Cf. Bracton's Note Book, No. 67. The council finds that the justices in eyre have wrongly condemned a man to death; his property is restored to the heirs and the justices are in mercy. Cf. Placit. Abbrev. (Kanc'), p. 153, Y. B. 33-35 Edw. I., pp. 53-55 and 137-139 where Hengham, Justice of the Bench, has to appear "coram rege" in person and account for his judgment in refusing to grant a sealed bill to the defendant according to statute. See also Pollock and Maitland, II., p. 665.

[7] Placit. Abbrev. (North'), p. 239. Reference to Magna Carta, c. 17.

[8] Cf. Maitland, Introduction to Bracton's Note Book, I., p. 58.

[9] For example, Bracton's Note Book, No. 367, Placit. Abbrev. (Norf'), p. 82.

[10] See supra, pp. 40-44. Cf. Gneist, Englische Verfassungsgeschichte, p. 229.

The business at the bench stopped; the justices, with others associated with them, were on circuit and the cases pending in the bench were now brought before them in the counties.[1] The procedure was the same; but it is to be noted that the justices, thus separated, often felt themselves incompetent to decide difficult cases, those calling for an exercise of equity or involving a new interpretation of the law. Such cases were left for further discussion by the justices of the bench, by the king or by the council, and, meanwhile, license was often given to the parties to come to an agreement.[2] This seems to have been more out of caution than from lack of competence, as their judgments might be reconsidered by either bench.[3] The justices in eyre could review the proceedings of the county courts[4] and grant privileges beyond the "rigor juris", "*de consilio curiae*" or "*de gratia*".[5] They used their discretion as to pardoning the mercy fine.[6] In handling crown pleas, the punishment to be applied lay largely at the discretion of the justices. "A. deserves death, but by way of dispensation let her eyes be torn out."[7] It has been noted above, that those who were appealed at the suit of the king were likely to escape with nothing worse than a fine.[8]

To fill out this sketch, it seems to be necessary to make a brief inquiry, such as that made for the Anglo-Norman period, into the status of justice in the time of Glanvill and Bracton. Down to the end of the reign of John, a great deal

[1] Cf. Pollock and Maitland, I., 179-181. Bigelow, Procedure, p. 102: "The king's tenants in chief could perhaps refuse to go before the justiciars itinerant, but the causes and appeals of all others were certainly entertained by them."

[2] See the frequent cases of "Loquendum" in the eyre rolls. Also Placit. Abbrev., p. 16: "[Loquendum] de puero submerso apud Tidrinton utrum si murdrum infra xv annorum an non." Select Pleas of the Crown, No. 177: "Et Burgenses quesiti si inde se ponere velint super comitatum, dicunt quod non. Et ideo loquendum ad magnam curiam." Select Civil Pleas, No. 190,—"discuciatur per consilium si jurata debeat esse vel non." See also Ibid. Nos. 205, 255.

[3] Cf. Pollock and Maitland, II., p. 665.

[4] Placit. Abbrev. (Cantebr'), p. 148.

[5] See supra, pp. 39, 44.

[6] For example, Select Pleas of the Crown, No. 181: The jurors are in mercy for giving a false verdict. The judges pardon the fine.

[7] Select Pleas of the Crown, No. 77. Cf. Northumerland Assise Rolls., p. 313: S. is only accused of a small theft, so let him return. Placit. Abbrev. (Sutht'), p. 85: Notice of a woman burnt to death for killing her husband—a very extreme punishment.

[8] Pp. 33-34.

of that which has been said as to the sale of justice in the former period still applies; the difference is that, from the time of the reforms of Henry II., the king's court has an ever-increasing regular justice and is no longer only an extraordinary court for great vassals. Thus the king's justice is no longer a privilege to be paid highly for except so far as regards the purchase of a writ in chancery. The price of writs, however, was not a fixed one, and the fines levied are still arbitrary and very high. In 14 John, a man gives the king one hundred marks for a writ of mordancester.[1] Peter de Nerford, who is in mercy for making default, has to pay thirty marks.[2] William, who loses by the verdict of a jury of attaint, is amerced one hundred marks.[3] The price for the privileges that the court is able to give is equally high and arbitrary. The defendants to an appeal made by a baron give three hundred marks and three good palfreys for license to come to an agreement with the plaintiff.[4] For having an inquisition, ten, twenty and thirty marks are given.[5] In the case of Bishop Hugh of Coventry against his canons, each party offers the king six hundred marks to have possession.[6] In criminal pleas, the proof most made use of, down to 1215 when it was abolished, was the ordeal; but records of failure to pass the ordeal successfully are of very rare occurrence.[7]

But the clause of Magna Carta[8] by which justice is not to be sold, denied, or delayed, had its salutary effect. In Henry III.'s reign the open sale of justice is a thing of the past.[9] The fines of those declared in mercy by the justices in eyre are fixed by the juries at the end of the session,[10] and the rule is carried out that they should be remitted in cases of poverty.[11] The

[1] Placit. Abbrev. (Sussex'), p. 86.
[2] Ibid. (Suff'), p. 84. (13 John).
[3] Ibid. (Ebor'), p. 86. (14 John).
[4] Ibid., p. 80. (North').
[5] Rot. Cur. Reg., II., pp. 176, 265. Placit. Abbrev. (Wiltes'), p. 6. See also Ibid. (Sumers'), p. 86.
[6] Placit. Abbrev. (Warr'), p. 5. Cf. Ibid. (Ebor'), p. 64, (Sussex'), p. 85. Hoveden chronicles, that in the year 1200, William de Stuteville gave the king 3000 marks for having judgment of the manor of Mowbray. (IV., p. 117).
[7] In Select Pleas of the Crown, No. 116 is the only record of a failure.
[8] Cap. 40.
[9] Cf. Maitland, Introduction to Bracton's Note Book, I., p. 129.
[10] Cf. Magna Carta, c. 20. See Pollock and Maitland, II., 512-513.
[11] See supra, p. 31. Northumberland Assise Rolls, pp. 9, 10, 45, 109, 286, etc. Cf. Bracton's Note Book, No. 313, Year Books, 30-31

payments for procedural advantages have dwindled to sums generally varying from twenty shillings to five marks. Such advantages are inquisitions,[1] attaints,[2] aid,[3] transferring the case to another court,[4] receding from writ,[5] having the case postponed,[6] having the time at which the plaintiff claims his ancestor was seised, made the special issue on which an assise is to decide.[7]

Only in one quarter do we find the old state of things existing, and that quarter is the king. For the privileges that he grants he expects to be paid, and even to have his judgment in a case is looked upon as a privilege. If he allows himself to be impleaded or called to warranty, his price must be paid.[8] The jurors make fine with the king for three hundred pounds that no jury of attaint be allowed to swear as to their verdict.[9] In 25 Henry III., the king claims that the Earl of Pembroke has taken the homage of M. which properly belongs to himself, and by this says that he is damaged to the sum of ten thousand marks.[10] If one of his officers offend, he is truly in mercy of the king.[11]

But, in general, the reign of Henry III. is a period of growth for the common law. The chroniclers may complain of the extortion of the justices,[12] and now and again we may hear of injustice done in the special case;[13] but plea rolls and

Edw. I, p. 141. Also see Bracton's Note Book, No. 1460: "Et misericordia perdonatur quia pugnant pro rege." Northumerland Assise Rolls, pp. 5, 63, 155, 346.
[1] Note Book, passim. North. Ass. Rolls, pp. 56, 62. 184, etc.
[2] Placit. Abbrev., p. 124. North. Ass. Rolls, p. 142.
[3] Select Pleas of the Crown, No. 158.
[4] Ibid. Nos. 46, 115.
[5] North. Ass. Rolls, p. 299.
[6] Ibid. pp. 140, 375.
[7] Bracton's Note Book, Nos. 685, 950, 1558. Placit. Abbrev., pp. 125, 226, Y. B. 32-33 Edw. I., pp. 361, 375.
[8] Bracton's Note Book, No 1106: E. de E. gives a thousand pounds to have the judgment of the court in a case in which the king disseised him. Ibid, 1109. Twenty marks offered for a judgment in a case of wardship where the king had granted the wardship to another. Ibid. No 743. Placit. Abbrev. (Nott'), pp. 79-80. S. claims to hold of the king and offers thirty marks that the king should warrant him.
[9] Bracton's Note Book, No 1326.
[10] Placit. Abbrev. (Wallia), p. 108.
[11] Placit Abbrev. (Wygorn'), p. 115. A sheriff is found to have given a wrong judgment. "Ideo americiatus est ad xl. marcas per Dominum Regem."
[12] See Matt. Paris. Chron. Maj., IV., p. 34.
[13] Y. B. 31-32 Edw. I., pp. 503-507,—"Et nota quod fecerunt hoc

year books bear witness to the steady growth of regular justice accessible to all freemen. At the end of the reign of Henry III., "most of the main outlines of our 'common' or unenacted law have been drawn for good and all".[1]

justiciarii magis ad appruyamentum Regis faciendum quam ad legem manutenendam." Cf. Horwood, Introduction to Year Books, 20-21 Edw. I., pp. ix-xi.

[1] Pollock and Maitland, I., p. 153.

CHAPTER V.

PETITION IN PARLIAMENT.[1]

It is incumbent on me to note the beginnings of a new court of equity which in the fourteenth and fifteenth centuries existed side by side with the council and the chancery. I say the beginnings of a new court, for, in the early parliaments, the petitions for relief are neither petitions by parliament, nor petitions addressed to parliament, but to the king or to the king and council.[2] Nor does the parliament in its fullest sense, that is inclusive of the representatives of shire and borough, deliberate on petitions. The council forms the active part of the parliament. The parliament of 1305 continues to be called a full parliament even after all the members, except the counsellors and those having special business to transact, have been sent home.[3] The king appoints committees to receive and dispose of the petitions; only those which are so much of grace that they cannot be settled elsewhere are to come before him.[4] It is only seldom that a direct remedy is given; and then in matters in which the king alone is well able, often morally obliged, to give relief.[5] By far the greater part are referred to the council, exchequer, the benches, the chancery, the wardrobe, or to special justices, with a general order that right should be done. Often the petitioner is told to seek remedy by the common law,[6] and,

[1] The composition of, and the nature of the business transacted by, a parliament of Edward I.'s reign are fully discussed by Maitland in the Introduction to the Memoranda de Parliamento, 1305.

[2] Ibid., pp. lxvi-lxvii.

[3] Ibid., pp. xxxv-xxxi.

[4] Ibid., pp. lv-lvii.

[5] See cases of "Rex vult", Mem. de Parl., 1305, Nos. 56, 77, 96. "Conceditur pro Deo", Rot. Parl., I., p. 3. Cf. Maitland, Introd. to Mem. de Parl. 1305, p. lxviii.

[6] "Et perquirat sibi secundum communem legem". Mem. de Parl. 1305, Nos. 45, 48, 114, 115, 132. Rot. Parl., I., p. 5.

sometimes, the form of the writ by which he should sue is given him.[1]

The equity of this procedure by petition lies herein, that by this means remedy is asked against the king, who cannot be sued,[2] and is, as a rule, granted. Often it is prayed that a case be allowed to proceed which has been postponed indefinitely because the defendant claims to hold of the king in chief. These cases will be referred to the appropriate court and there right will be done between king and plaintiff; but the permission that a case may proceed against the king must always be looked upon as an act of grace.

The light thrown on the council shows it a tribunal with large and undefined powers. As an equitable tribunal it helps the king to exercise that equity which lies in his person and which has been described in a former chapter.[3] Where the petitioner can have no writ in chancery to suit his case, the council can provide one in a new form.[4] It makes ordinances.[5] But, though the council is referred to in all these ways, in general, it appears as an advisory body which aids the king to carry out his powers; its development as a regular tribunal administering equity belongs to a period after the thirteenth century.[6]

A very large number of the petitions are referred to the exchequer with a general order that there justice shall be done.[7] These are petitions for debts due from the king, or involving fines, or for lands which the king has seized. If the case involves points of law, the justices of the two benches are associated with the barons of the exchequer.[8] This forms a tribunal very like the council[9] to do right between king and plaintiff.

Only a few petitions are sent to the chancery which do

[1] Mem. de Parl., 1305, Nos. 14, 116, 134. Rot. Parl., I., pp. 2, 11, 46.

[2] Cf. Maitland, Introduction to Mem. de Parl., 1305, pp. lxvii-lxxi.

[3] Chap. II. For the business of the council see Hardy, Introduction to the Close Rolls, p. xxvi.

[4] Mem. de Parl., 1305, No. 251. According to the Statute of Westminster, II., c. 24. Cf. Maitland, Introd. to Mem. de Parl., 1305, p. lxii.

[5] See, for example, Mem. de Parl., 1305, No. 479.

[6] Cf. Pollock and Maitland, I., pp. 178-179.

[7] Mem. de Parl., 1305, Nos. 4, 12, 14, 21, 22, 43, etc. Rot. Parl., I., passim. Cf. Pollock and Maitland, I., p. 171.

[8] Mem. de Parl., 1305, Nos. 201, 244, 258.

[9] Cf. Mem. de Parl., 1305, No. 93 "Provideatur competens consilium per Thesaurarium et alios de consilio Regis."

not have reference to obtaining a writ[1]. They refer to matters which concern the king, and, as a special class among these, matters that concern the king's wards.[2]

Such petitions are among the first references we have to a jurisdiction in chancery. To an equitable jurisdiction of the chancellor there is no reference in this period.[3] The chancellor was a judge; in 2 Henry II. we hear of him as a justice in eyre[4], and, apparently, again in the time of John.[5] He was a baron of the exchequer and became in course of time the president of the council. But his office was chiefly a clerical, not a judicial one. He was "the secretary of state for all departments."[6]

A large part of the business of the chancery was the issue of the original writs.[7] So far as we can see, there was no restraint on the power to issue new writs to meet new cases until the Provisions of Oxford in 1258, by two clauses of which the chancellor is bound to issue no more writs, except writs "*de cursu*," without command of the king and of his council.[8] This tended to fix the form of the common writs and to hinder the common law from entertaining new forms of action. Within thirty years, however, a remedy for this state of things was given by the statute of Westminster II., by which the clerks in chancery were authorized to frame new writs, where none of those already in existence were adequate, when a case was presented "*in consimili casu*" to any such writ then existing.[9]

[1] Mem. de Parl., 1305, Nos. 34, 39, 41, 204, 206. Rot. Parl., I., pp. 6, 10, 47, 52, 60.

[2] Mem. de Parl., Nos. 39, 41.

[3] Cf. Pollock and Maitland, I., p. 176.

[4] Pipe Roll, 2, 3, & 4 Henry II., pp. 17, 65.

[5] See Placit. Abbrev., p. 96. "Fragmenta Recordum incerti Temporis Regis Johannis."

[6] Stubbs, Const. Hist., I., p. 381. Cf. Pollock and Maitland, I., p. 172.

[7] Cf. Pollock and Maitland, I., pp. 174-175. Cf. Hardy, Introduction to the Close Rolls, p. xxxii.

[8] Stubbs, Charters, pp. 389, 391. Too much weight must not be laid on this as the Provisions were repudiated by the king in 1261. But these clauses mean an attempt by the constitutional party to confine the power to frame new writs to the king in council and thus to prevent the king from framing new writs of his own authority. See Pollock and Maitland, I., pp. 174-175.

[9] Chapter 24. Statutes of the Realm, I., pp. 83-84. See Bigelow, Procedure, pp. 197-198. Introduction to Placita Anglo-Normannica, pp. xxix-xxx. Kerly, pp. 9-13.

CONCLUSION.

Having now traced the exercise of equity through the period before the appearance of the chancery as a court of law, it will be well to weigh the importance of the equity exercised by the king, and that exercised by the judges of his courts apart from him, in their relation to the later development. The equity, as opposed to the rigor of the law, which the judges of the king's court could exercise, helps to explain the late appearance of a special court of equity; but, as has been pointed out, it was not frequently exercised and, as a general rule, in matters of minor importance. The judges of the common law courts have in all times wielded a certain amount of discretion; a discretion as to granting extraordinary means of distraint, essoins, aid, assizes, inquisitions, and attaints is not of very wide scope.[1] It could go farther: third parties might be called;[2] the strict wording of a statute, although perfectly clear, might be disregarded because of the hardship that would ensue;[3] in criminal matters the penalties were largely at the discretion of the justices,[4] and in some ways the law was more elastic than in later days, but it does not seem to have been often stretched. In general, the judges show a decided tendency to throw the responsibility for a judgment on the letter of the law, or to refer the matter to the king, rather than to use that power, which must, from the examples here given, be allowed to them, of mitigating the law to meet the special case.[5] It must be clearly borne in mind that the common-law courts did not pretend to give a remedy

[1] See above, pp. 45-46.
[2] Supra, pp. 41-42, 46.
[3] Supra, pp. 47-48.
[4] Supra, p. 51.
[5] Cf. Pollock and Maitland, II., 561, 667-669.

for every kind of wrong: they existed side by side with the special jurisdiction of the king and that of the ecclesiastical courts; by process of time the cognizance of each was defined and the common law grew up between the boundaries of the other two. Through its natural tendency to become case law,[1] aided by the influence of a trained class of lawyers, and through the restraint on the issue of original writs, the common law, fixed in its procedure through its Germanic origin, tended also to become fixed in its cognizance of special kinds of cases only. To the other two jurisdictions, especially to that of the king, we must look for the sources of the chancellor's jurisdiction.

And here the course is clear and has often been pointed out by writers on equity. The details of the growth of the chancellor's jurisdiction lie only in their very beginning within the scope of this essay and call for no treatment here. That part of moral right which the common-law courts and the ecclesiastical courts did not recognize, lay within the scope of the jurisdiction of the king as source of justice.[2] Thus it was an undefined jurisdiction, exercised by him in part alone, in part, with the help of his council. It is for this that the petitions in parliament beg; and these, as has been pointed out, were petitions to the king or to the king in council.[3] Also, we have seen how some of these were referred to the chancellor; the steps by which they become petitions to the chancellor direct are to be followed in Hardy, Spence, Story, and Kerly.

The early jurisdiction in Chancery[4] is undefined and therefore dangerous for the common law. The petition or bill states that the petitioner is too poor to sue at common law or needs a quicker remedy; the greater part mean that the power, influence, or protection that the defendant enjoys is so great that the petitioner is afraid to sue at common law.[5] The chancery procedure is more secret, offers a quicker, more direct remedy. A distinction between the common law and the equitable jurisdiction of the chancery is out of place in the time of

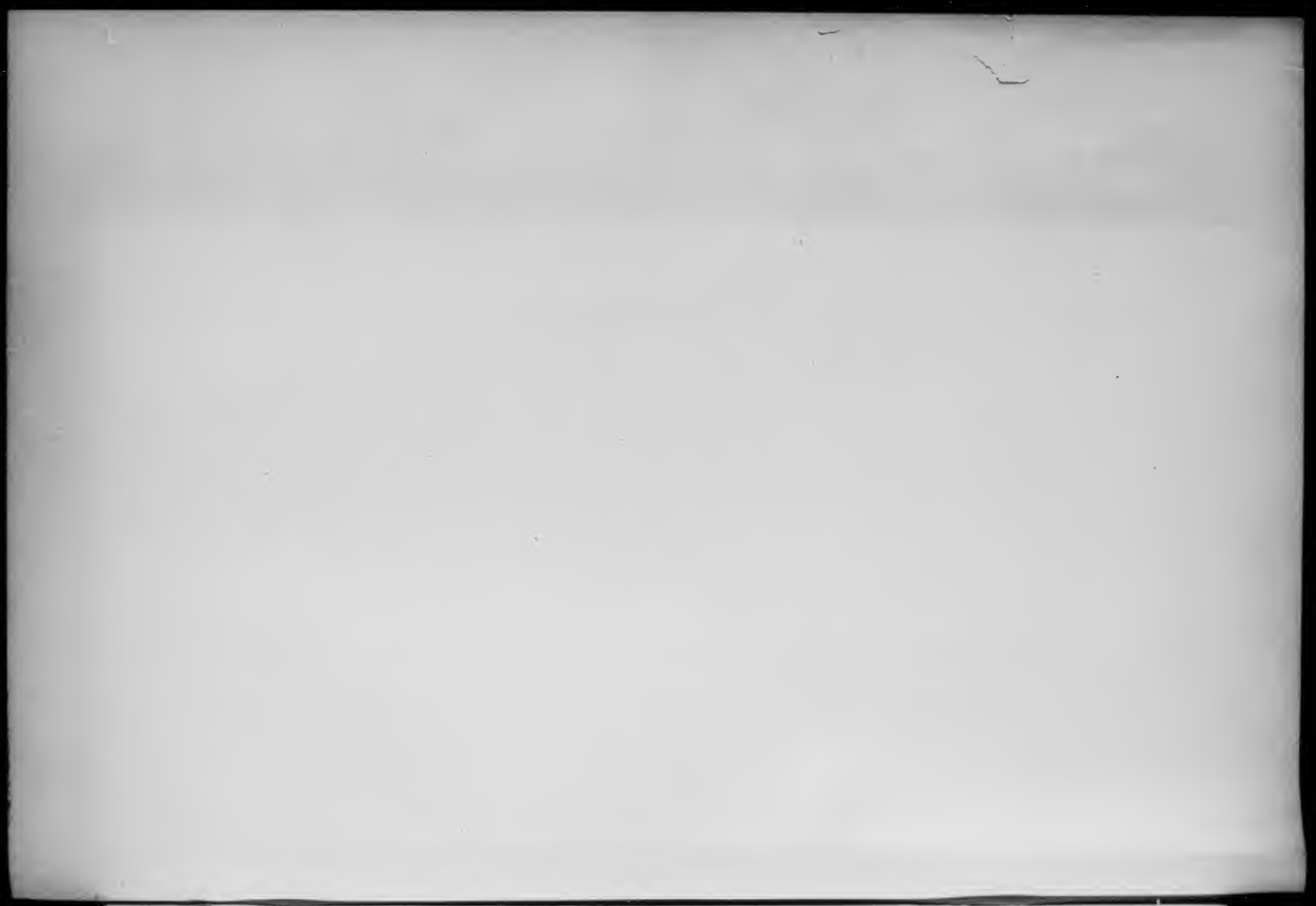
[1] Cf. Spence, I., pp. 321-322.
[2] I do not mean by this that he did attempt to exercise so broad a jurisdiction,—that would have been impossible,—but this was the basis of his jurisdiction.
[3] Supra, p. 55.
[4] I base what follows on an examination of Select Cases in Chancery, 1364-1471, ed. W. P. Baildon, Selden Soc., London, 1896.
[5] Cf. Story, I., p. 52, Kerly pp. 71-73.

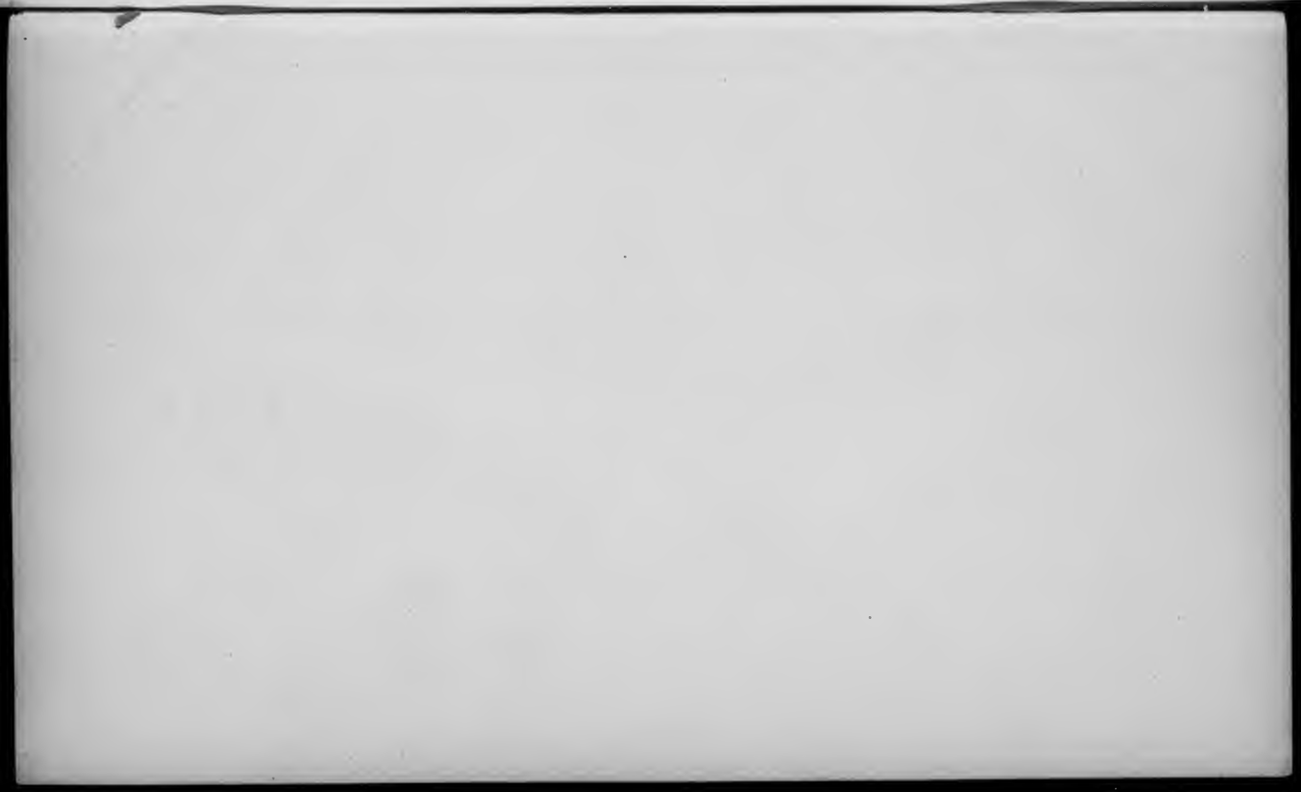
Henry V. The chancellor's jurisdiction is all extraordinary, and what later would be called the equitable procedure is in this time often applied to the so-called common-law cases.[1] Holmes finds, that, down to the end of the reign of Henry V., the chancery enforced only two substantive doctrines not recognized by the other courts,—the use, and a peculiar view of contract.[2] Both of these belonged to the ecclesiastical jurisdiction as matters of faith and, for this reason, never were enforced by the courts of common law; they fell to the chancery, it would seem, on account of its ecclesiastical character.[3] But these cases occur seldom and are not, as has been said, distinguished from the others by a special procedure in the time of Henry V. Almost all the cases point to the failure of the common law to provide an adequate remedy and, therefore, the remedy given in chancery is equitable. The process of division and definition, helped by the jealousy of parliament in the interest of the common law,[4] goes on through the following century, until those cases to which a common-law procedure does not apply, and those alone, are termed equitable.

[1] Cf. Kerly, p. 56.
[2] Early English Equity, Law Quarterly Review, April, 1885, p. 162.
[3] Ibid. 168-170, 174. Black. Comm. III., pp. 52-53.
[4] See Kerly, Chap. IV., for petitions of parliament against the chancellor's jurisdiction.

BIOGRAPHICAL SKETCH.

The writer, Elliot Hersey Goodwin, was born in Cambridge, Massachusetts, U.S.A., January 6, 1874, son of Hersey Bradford and Ellen Christina Goodwin. His father is a commission merchant of Boston. The writer fitted for college at a private school in Cambridge. In the autumn of 1891, he became a student of Harvard University at Cambridge and received the degree of A.B. June, 1895. Then followed a year of post-graduate work in History at Harvard, for which he received the degree of A.M. The writer was matriculated a student of the University of Leipzig October, 1896. During four semestres at Leipzig, he has attended the lectures of Professors Lamprecht, Marcks, Seeliger, Hauck, Heinze, Fricker, Ratzel, and Bücher and has taken part in the historical Seminars conducted by Professors Lamprecht, Marcks and Buchholz. To the last named three, with whom he has had the opportunity of becoming personally acquainted, he wishes to express here his thanks for their ever-ready assistance and kindness.





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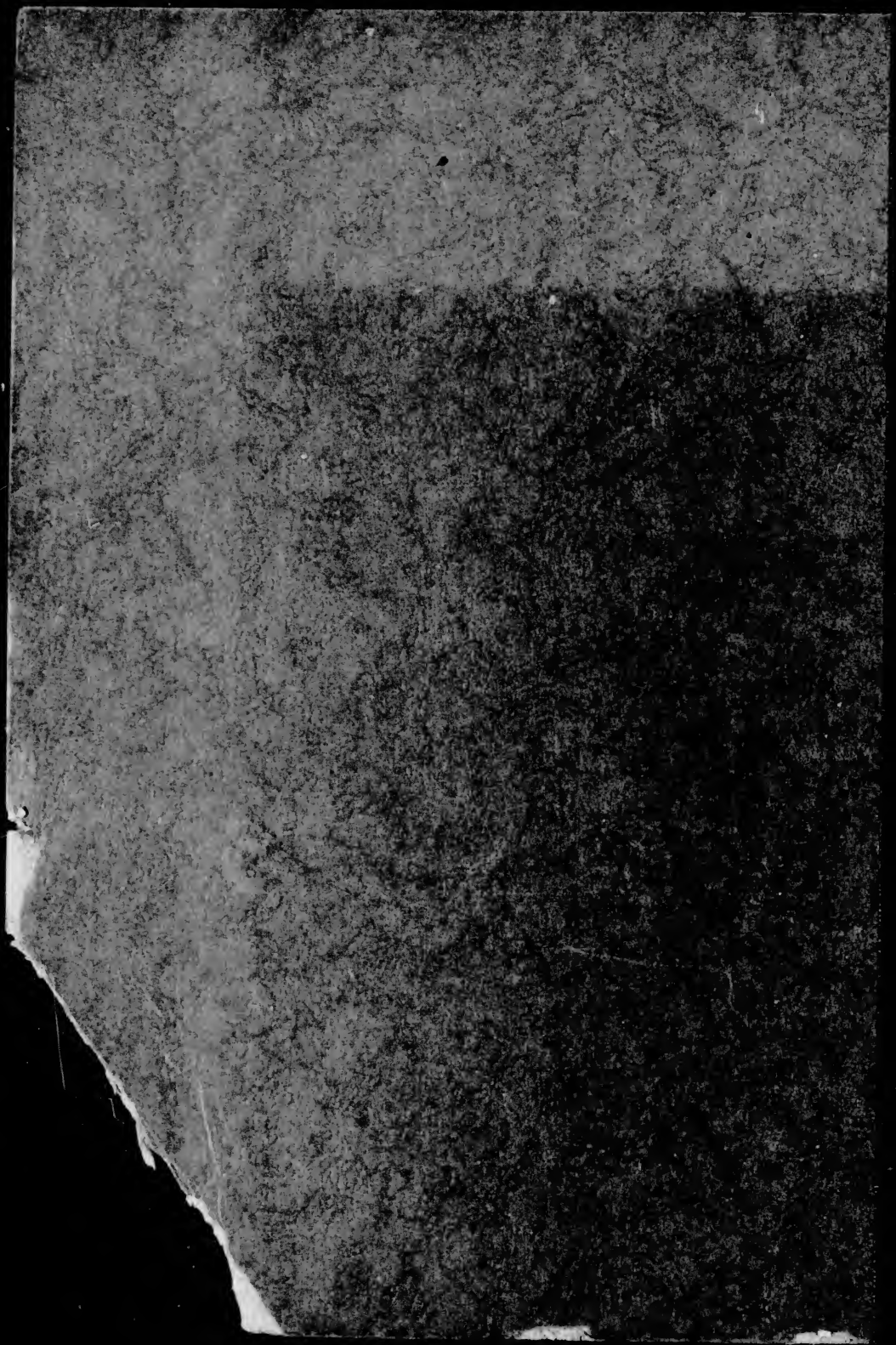
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